The Law Commission

Working Paper No. 87

and

The Scottish Law Commission

Consultative Memorandum No. 62

Private International Law
Choice of Law in Tort and Delict

UNIVERSITY OF LONDON

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This consultation paper, completed for publication on 28 September 1984, is circulated for comment and criticism only.

It does not represent the final views of the two Law Commissions.

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Summary

When a dispute arises in one part of the United Kingdom out of a tort or delict which was committed in another part of the United Kingdom or in a foreign country, the country whose law will be used to decide the dispute is selected by rules of private international law. In this consultation paper a Joint Working Party of the Law Commission and the Scottish Law Commission examines the rules of private international law which apply at present and provisionally recommends that they be abolished and replaced by new rules. Two alternative replacements are provisionally proposed and examined in the context of a number of specific issues. The purpose of this paper is to seek the views of the public on the proposals which it contains, all of which are provisional only.

Members of the Law Commissions' Joint Working Party on Private International Law

This consultation paper, apart from Part I, was prepared by a Joint Working Party of the two Law Commissions, composed as follows -

Professor A.L. Diamond, Chairman	Director, Institute of Advanced Legal Studies
Mr. A.E. Anton, C.B.E., F.B.A.	Consultant, Scottish Law Commission
Mr. R.D.D. Bertram, W.S.	Scottish Law Commission
Mr. L.A. Collins	Partner, Messrs. Herbert Smith & Co., London
Mr. B.J. Davenport, Q.C.	Law Commission
The Hon. Lord Maxwell	Scottish Law Commission
Mr. C.G.J. Morse	King's College London
Dr. P.M. North	Law Commission
Mr. R.J. Dormer, Secretary	Law Commission

A note on terminology and citations

For the sake of convenience, a tort or delict which forms the basis of an action in the United Kingdom in which our choice of law rules in tort and delict are invoked is referred to in this paper as a **"foreign tort"** or **"foreign delict"**. The word **"wrongdoer"** is used to mean the tortfeasor or delinquent: he will usually be the defendant or defender in an action in the United Kingdom. The word **"claimant"** is used to mean the plaintiff or pursuer; he will usually also be the victim of the tort or delict.

The following works are cited hereafter by the name of the author alone:

Anton	Private International Law (1967)
Cheshire and North	Private International Law (10th ed., 1979)
Dicey and Morris	The Conflict of Laws (10th ed., 1980)
Kahn-Freund	"Delictual Liability and the Conflict of Laws" [1968] II Receuil des Cours 1.
Morse	Torts in Private International Law (1978).

The following contractions are also used:

"E.E.C. Draft Convention" refers to the E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1972). The relevant provisions are reproduced below in the Appendix to this paper.

"Hague Traffic Accidents Convention" refers to the Hague Convention on the Law Applicable to Traffic Accidents (1971).

"Hague Products Liability Convention" refers to the Hague Convention on the Law Applicable to Products Liability (1973).

"Restatement Second" refers to the American Law Institute's Restatement of the Law Second. References to the Restatement Second should, if the context permits, be taken to refer only to that part of the Restatement of the Law Second which deals with the conflict of laws (published in 1971).

THE LAW COMMISSION

Working Paper No. 87

AND

THE SCOTTISH LAW COMMISSION

Consultative Memorandum No. 62

PRIVATE INTERNATIONAL LAW[1]

CHOICE OF LAW IN TORT AND DELICT

PART I

INTRODUCTION

A. THE PROBLEM DESCRIBED

1.1 The area of our law known as the conflict of laws, or private international law, provides rules for dealing with cases which contain a foreign element - that is, where some aspect of the case has connections with a country other than that of the "forum" (the home country of the court hearing the case). In any particular case our rules of private international law may require that the rights and liabilities of the parties be decided, not by the law of the forum (which for the sake of convenience is referred to hereafter as the "lex fori") but by another country's law. For these purposes, England and Wales, Scotland, and Northern Ireland are treated as separate countries in the same way as wholly foreign countries are.

1.2 This consultation paper is concerned with the particular part of our private international law which deals with tort or delict cases containing a foreign element. Before considering the rights and liabilities of the parties to a dispute in the United Kingdom arising out of a tort or delict which was committed in another part of the United

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1 Third Programme of the Law Commission, Item XXI; Third Programme of the Scottish Law Commission, Item 15.

Kingdom or in a foreign country, the court must first go through a selection process known as "choice of law", in order to decide by what law those rights and liabilities are to be determined. In the field of tort and delict, that selection process raises "one of the most vexed questions in the conflict of laws".[2] This consultation paper is concerned with the choice of law rules by which the courts in England and Wales, in Scotland and in Northern Ireland decide which system of law shall apply in a tort or delict case. A summary of the provisional proposals made in this paper is set out in Part VII below.

1.3 Examples of torts and delicts in which our choice of law rules come into play are: (a) a road accident in England which is the subject of an action in Scotland;[3] (b) a defamatory statement published in Germany which forms the basis of an action in England;[4] (c) an injury at work in Libya for which the claimant seeks compensation in England;[5] and (d) an injury sustained on a Scottish ship in foreign territorial waters and which is later the subject of an action in Scotland.[6] Our present law in cases such as these is thought by many to be outdated and unsatisfactory. Since the decision of the House of Lords in Boys v. Chaplin[7] the present law is also uncertain, and one scholar has remarked that "[t]he uncertainty in the law disclosed by the history of [Boys v. Chaplin] is unlikely to escape the attention of the Law Commission ...".[8]

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2 Boys v. Chaplin [1968] 2 Q.B. 1, 20 (C.A.), per Lord Denning M.R.

3 McElroy v. McAllister 1949 S.C. 110.

4 Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 (C.A.).

5 Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

6 MacKinnon v. Iberia Shipping Co., Ltd. 1955 S.C. 20.

7 [1971] A.C. 356. We refer to this decision throughout as Boys v. Chaplin and not as Chaplin v. Boys even though it was decided before the House of Lords Practice Direction on the titles of cases [1974] 1 W.L.R. 305.

8 Graveson, "Towards a Modern Applicable Law in Tort", (1969) 85 L.Q.R. 505, 515.

1.4 The private international law of tort and delict is a highly specialised field which is very important in certain spheres of activity but whose immediate impact on the general public has hitherto been slight. Nevertheless, its importance is increasing, as has been explained by Dr. J.H.C. Morris,* writing in the English context:

> "Just as the law of contract responded to the pressures of international trade in the nineteenth century, so in the twentieth century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and to the means of transport and communications. Most of these pressures operate regardless of national or other frontiers. Dangerous drugs can cause babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Unfair competition is no longer confined to a single country. Every year English motor-cars visit the continent of Europe in their thousands; accidents occur; people are injured or killed. English television aerials receive programmes from continental Europe, and even (with the aid of satellites in space) from America and Australia; private reputations sometimes suffer. For all these reasons, the conflict of laws can no longer rest content with solutions designed for nineteenth-century conditions."[9]

When the relevant provisions of the Civil Jurisdiction and Judgments Act 1982 come into force it is also possible that cases involving our choice of law rule in tort and delict will come before our courts more often than they have in the past (although it should be noted that none of the proposals made in this consultation paper would themselves affect in any way the jurisdiction of courts in the United Kingdom). Further, of the three main fields in our private international law of obligations (namely contract, trusts, and tort or delict), one (contract) has recently received attention, and the Hague Conference on Private International Law will be considering the law applicable to trusts and their recognition at its session this autumn. This leaves only tort and delict, which is the subject of this consultation paper.

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* Since this paper was prepared we have learnt with great sadness of the death of Dr. John Morris. His unique contribution to the law on this subject appears throughout this document.

9 Morris, The Conflict of Laws (3rd ed., 1984), p. 301.

1.5 The intricacy of the issues which arise in this area of the law is not in doubt, but it means that an examination of the options for reform could either be short but shallow, with little exploration of their implications, or long but deeper, with some explanation of how the options proposed would work in practice. The latter course is followed in this consultation paper, on the ground that this is not an area where it is possible to form a view about whether a proposal is acceptable without first understanding what its ramifications would be. However, this does mean that the consultation paper is long and detailed: more so than some readers may find necessary for their purposes. Some guidance for such readers is offered in paragraph 1.10 below.

B. THE ORIGIN OF THIS PROJECT

1.6 The Law Commission and the Scottish Law Commission became involved in this field as a result of proposals for an E.E.C. Convention on the law applicable to contractual and non-contractual obligations.[10] In March 1978 the Brussels Group of Experts considering the draft Convention decided to confine the proposed Convention to contractual obligations only,[11] but it was agreed that negotiations should be resumed on non-contractual obligations later, with a view to preparing a separate convention on that subject. In 1979 the two Law Commissions set up a Joint Working Party to provide advice to the United Kingdom delegation which would be concerned with the intended negotiations, and also to consider the reform of the choice of law rules in tort and delict in Great Britain. It later became clear that the formulation within the E.E.C. of a convention on non-contractual obligations would not, for the moment at least, proceed; and the Joint Working Party therefore

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10 The history of the Law Commissions' involvement may be traced through the Annual Reports of the Law Commission (from the Eighth (1972-1973) to the Eighteenth (1982-1983)) and of the Scottish Law Commission (from the Eighth (1972-73) to the Seventeenth (1981-82)).

11 The E.E.C. Convention on the Law applicable to Contractual Obligations (Cmnd. 8489) was concluded on 19 June 1980 and was signed by the United Kingdom on 7 December 1981. It has not yet been ratified by the United Kingdom.

confined its attentions to reform of this area of the law in Great Britain. Later the project was extended to cover Northern Ireland.

C. PREPARATION OF THIS PAPER

1.7 Although the two Law Commissions have considered in general terms the two preferred options for reform presented in this paper, and have agreed that both should be put forward for the purposes of consultation, the Law Commissions have not as such taken an active role in the preparation of this consultation paper. The remaining Parts, including the provisional conclusions and proposals, are the work of the Joint Working Party, whose present members are listed above at page (xiii). However, it is envisaged that when the consultation period is over the two Law Commissions will take responsibility in the usual way for the preparation of a Report on this subject.

1.8 The two Law Commissions are grateful to the outside members of the Joint Working Party for the time and effort which they have devoted to the preparation of this paper. Gratitude is due in particular to the Chairman, Professor A. L. Diamond, who is Director of the Institute of Advanced Legal Studies in London; and to Mr. C. G. J. Morse, of King's College London, whose contribution included the preparation of two substantial papers for the Joint Working Party. The comparative material in the Appendix to this consultation paper comes from one of those papers. Thanks are also due to the Office of Law Reform in Northern Ireland, which has been responsible for references to Northern Ireland law; and to Dr. James Fawcett, of the University of Bristol, who wrote a paper for us in the early stages of the project.

D. STRUCTURE OF THIS PAPER

1.9 The remainder of this paper is arranged as follows:

Part II: a statement in general terms of the present law of England and Wales and of Ireland, followed by a statement in general terms of the present law of Scotland, and then by an examination of the operation of

the present law in the context of a number of particular issues;

Part III: a statement of the defects in the present law and the reasons for reforming it;

Part IV: an examination of the options for reform, provisionally eliminating all but two of them;

Part V: an examination of how the two remaining options for reform would work for particular types of tort and delict;

Part VI: consideration of the operation of the two remaining options for reform in the context of the particular issues which were discussed in Part II;

Part VII: a summary of provisional conclusions;

Appendix: legislative provisions on choice of law in tort and delict from selected foreign countries; and the relevant articles of the E.E.C. Draft Convention.

1.10 Those readers who require only a broad outline of the present law and of our proposals for reform may find it sufficient to confine their attention to the early sections in Part II (paragraphs 2.1 -2.46), where the present law is discussed; Part III, where we consider the case for reform; and the later sections in Part IV (paragraphs 4.55 - 4.146), where we consider the two alternative options which we provisionally propose for replacing our existing law. Those two options are summarised at paragraph 4.144. The main issues raised in this paper are whether either of those two options is an acceptable replacement for our present law; if both, then which is preferable; and if neither, then what other rule should be adopted. However, we seek comments not just on these questions but on all of the provisional conclusions and proposals which are contained in Parts IV to VI of this consultation paper. It should be borne in mind throughout that our proposals are intended ultimately to be cast in statutory form.

PART II

THE PRESENT LAW

General Introduction

2.1 The present law on this subject is unclear in certain respects and it involves many intricate questions of detail. This means that our examination of it must be somewhat extended. However, its basic structure can be fairly easily discerned. For this reason we have divided our discussion of the present law into a number of sections. First we consider the general principles of the law of England and Wales and of Northern Ireland, and then the general principles of the law of Scotland. We do not explore every aspect of these general principles, which are considered in the standard textbooks on the subject, but we hope that these sections will be sufficient to give the reader a broad understanding of the present law. In the succeeding sections, which some readers may find more detailed than they require, we consider in greater depth the implications of the present law as it applies to certain particular issues, and we also consider how it applies to torts or delicts committed in a single jurisdiction within the United Kingdom, and to torts and delicts involving ships or aircraft.

The law of England and Wales and of Northern Ireland

A. INTRODUCTION

2.2 The present English law is based upon two leading cases, which may be used as focal points. A general rule, which remains the foundation of the present law, was formulated by Willes J. in Phillips v. Eyre.[12] In Boys v. Chaplin[13] the House of Lords considered a possible exception to the general rule.

2.3 We are not aware of any Northern Ireland authority on the

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12 (1870) L.R. 6 Q.B. 1.

13 [1971] A.C. 356. We do not hereafter cite the reference to Phillips v. Eyre or to Boys v. Chaplin except upon the first mention of each decision in each Part of this paper.

choice of law in tort and delict. In the absence of such authority, a court in Northern Ireland would probably adopt rules of law corresponding to those which apply in England and Wales. The general rule in England and Wales has been adopted (albeit with modifications) in other common law jurisdictions, and the decisions of Australian and Canadian courts in particular are relevant to an analysis of the present law of England and Wales.

B. THE GENERAL RULE: Phillips v. Eyre

1. The emergence of the general rule

2.4 Phillips v. Eyre arose out of a rebellion in Jamaica, which was suppressed by Eyre (who was Governor of Jamaica) and by others acting under his authority. Phillips brought an action in England against Eyre, alleging assault and false imprisonment during the rebellion. Eyre pleaded inter alia that he was protected from liability by an Act of Indemnity which had been passed by the Jamaican legislature after the rebellion. Eyre's plea was upheld by the court, and the plaintiff's action therefore failed. Willes J., delivering the judgment of the court, expressed the general rule in the following terms:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; ... . Secondly, the act must not have been justifiable by the law of the place where it was done."[14]

This rule is referred to as "the rule in Phillips v. Eyre", and we refer to its two propositions respectively as "the first limb" and "the second limb" of the rule. We consider the present meaning of these two limbs below: the second limb, in particular, received a new interpretation in Boys v. Chaplin.

2.5 Although the rule in Phillips v. Eyre has given rise to many problems of interpretation, one particularly pervasive doubt has been

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14 (1870) L.R. 6 Q.B. 1, 28-29. This formulation was approved by the House of Lords in Carr v. Fracis Times & Co. [1902] A.C. 176.

whether the rule is a "choice of law" rule at all, in the sense in which that phrase is commonly understood; and it is true that although each limb of the rule is a choice of law rule in the sense that it directs attention to a particular system of law to the exclusion of all others, neither of the systems of law so selected is expressly stated to be the one according to which the court will decide the case.

2.6 This has led to the suggestion that the rule in Phillips v. Eyre is only a rule of "jurisdiction". The word "jurisdiction" must in this context be understood to mean jurisdiction over the subject-matter of the dispute, not jurisdiction over the parties: it has not been suggested that the rule in Phillips v. Eyre has any connection with matters such as the issue and service of a writ. What has been suggested is that the rule merely lays down two preliminary or "threshold" requirements. If these were satisfied, the court would then proceed to determine the substantive rights and liabilities of the parties according to a system of law selected independently of the rule in Phillips v. Eyre. An alternative suggestion is that only one of the limbs of the rule is a jurisdictional requirement of this kind, while the other is a choice of law rule; and some of the language of Willes J. in Phillips v. Eyre may indeed appear to support the idea that the second limb of the rule is a choice of law rule, whereby the rights and liabilities of the parties will be determined according to the law of the place where the tort occurred (hereafter referred to, for the sake of convenience, as the "lex loci delicti"), while the first limb of the rule is a rule of "jurisdiction", which would serve to exclude actions contrary to English public policy.

2.7 These arguments have attracted some support, particularly in Canada[15] and Australia,[16] but although there are echoes of them in

15 Hancock, (1940) 3 U. Tor. L.J. 400; Yntema, (1949) 27 Can. Bar Rev. 116; Spence, ibid., 661; Castel, (1958) 18 Rev. Barr. Quebec 465; Gagnon v. Lecavalier (1967) 63 D.L.R. (2d) 12; Northern Alberta Railways Co. v. K & W Trucking Co. Inc. [1975] 2 W.W.R. 763. Cf. Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 613-614.

16 Nygh, (1970) 44 A.L.J. 160 and Conflict of Laws in Australia (3rd ed., 1976), p. 258; Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20, especially per Windeyer J; Hartley v. Venn (1967) 10 F.L.R. 151. Cf. Harding, (1965) 7 West. Aust. L. Rev. 196, n.3; McClean, (1969) 43 A.L.J. 183.

England[17] they are not generally supported here;[18] and they appear to be inconsistent with the historical background of the rule in Phillips v. Eyre, neither limb of which was new at the time of Willes J.'s formulation.[19] In England and Wales, therefore, the rule in Phillips v. Eyre is regarded as a true choice of law rule, whose meaning we now proceed to consider.

2. The general rule in more detail

(a) The first limb of the general rule

> "[T]he wrong must be of such a character that it would have been actionable if committed in England".[20]

2.8 The first limb of the general rule is derived from The Halley,[21] and although it does not appear to have formed part of the ratio decidendi of any English case since The Halley, it has survived unscathed and was approved obiter in Boys v. Chaplin.[22] The Halley concerned a collision in foreign waters between two ships, and raised for the first time the question-

> "... whether an English Court of Justice is bound to apply and enforce [foreign] law in a case, when, according to its own principles, no

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17 See Boys v. Chaplin [1968] 2 Q.B. 1, 21F, 25B-C per Lord Denning M.R., 38B-G per Diplock L.J.; Boys v. Chaplin [1971] A.C. 356, 375E per Lord Hodson, 381 per Lord Guest, 383 per Lord Donovan.

18 Cheshire and North, p. 273; Dicey and Morris, p. 938; Graveson, Conflict of Laws (7th ed., 1974), p. 569, n.11; Morse, pp. 46-50; Boys v. Chaplin [1971] A.C. 356, 384-387 per Lord Wilberforce; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. See also the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police (briefly reported at (1976) 120 S.J. 690 (C.A.)).

19 See Morse, pp. 8-11, 25-30.

20 Phillips v. Eyre (1870) L.R. 6 Q.B. 1, 28-29.

21 (1868) L.R. 2 P.C. 193.

22 [1971] A.C. 356, 374 per Lord Hodson, 381 per Lord Guest, 383 per Lord Donovan, 389 per Lord Wilberforce, 406 per Lord Pearson.

wrong has been committed by the Defendants, and no right of action against them exists."[23]

Selwyn L.J. answered this question in the negative:

> "It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries, ... as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law ... as one of the facts upon which existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is ... alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."[24]

2.9 In the cases before The Halley, where this issue did not directly arise, it nevertheless appears to have been a tacit assumption that an action in England on a foreign tort would be determined according to English domestic law.[25] This is consistent with the fact that in such cases, by a legal fiction, the venue was laid in England: a device which was evolved by the common law courts to permit jurisdiction in certain actions over torts committed abroad. This device was necessary because, owing to the strict rules as to venue, the common law courts could originally not entertain an action on a foreign tort at all.[26]

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23 (1868) L.R. 2 P.C. 193, 202.

24 Ibid., 203-204.

25 See, for example, Blad's Case (1673) 3 Swans. 603, 36 E.R. 991; Blad v. Bamfield (1674) 3 Swans. 604, 36 E.R. 992; Dutton v. Howell (1693) Show. P.C. 24, 1 E.R. 17; Mostyn v. Fabrigas (1774) 1 Cowp. 161, 98 E.R. 1021; Dobree v. Napier (1836) 2 Bing. (N.C.) 781, 132 E.R. 301; R. v. Lesley (1860) Bell 220, 169 E.R. 1236; Scott v. Lord Seymour (1862) 1 H. & C. 219, 158 E.R. 865. See also Boys v. Chaplin [1971] A.C. 356, 395-396 per Lord Pearson.

26 See Hancock, Torts in the Conflict of Laws (1942), pp. 1-5; Holdsworth, A History of English Law, Vol. 1 (7th ed., 1956), pp. 534, 554; Vol. V (3rd ed., 1945), pp. 117-119, 140-142; Morse, pp. 8-9.

2.10 In England, this tacit assumption is now the generally accepted view of the first limb of the rule in Phillips v. Eyre: it is a choice of law rule the effect of which is to select English law in every case to govern an action in England on a foreign tort. This view was clearly expressed in Boys v. Chaplin by Lord Wilberforce[27] and Lord Pearson,[28] and has received both subsequent confirmation[29] and academic support.[30] In Australia[31] and in Canada[32] the lex fori is also applied as the substantive law to determine the rights and liabilities of the parties (subject to "justification" provided by the lex loci delicti). However, owing to the existence of support in those countries for the "jurisdiction" theory (mentioned above at paragraphs 2.5 - 2.7), it is not always entirely clear whether the choice of the lex fori is seen as arising out of or as separate from the rule in Phillips v. Eyre.[33]

2.11 Any action in England on a foreign tort will, therefore, be decided according to English internal law, and nothing turns on the meaning of the word "actionable" used by Willes J. in his formulation of

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27 [1971] A.C. 356, 384-387.

28 Ibid., 395-398.

29 Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1147, per Hodgson J.; 1154 per Robert Goff L.J. See also the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police (briefly reported at (1976) 120 S.J. 690 (C.A.)).

30 Cheshire and North, pp. 275-276; Dicey and Morris, p. 938; Morse, pp. 66-68.

31 Koop v. Bebb (1951) 84 C.L.R. 629; Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20. (These were both decisions of the High Court of Australia.)

32 O'Connor v. Wray [1930] 2 D.L.R. 899; McLean v. Pettigrew [1945] 2 D.L.R. 65. (These were both decisions of the Supreme Court of Canada.)

33 In New Zealand, there is some support for the English view as stated in the text: Richards v. McLean [1973] 1 N.Z.L.R. 521, 525.

the first limb of the general rule.[34] Subject to what is said in the next paragraph, the effect of the first limb of the rule in Phillips v. Eyre is simply that the whole of the domestic law of England and Wales (including the whole body of its statute law) is made available to the English court. This does not, however, imply that the lex fori has any intrinsic extra-territorial effect:

> "When the lex fori is applied in accordance with [the rules of private international law] to a case possessing a foreign element, this is not because the lex fori is held to possess some inherent power of extra-territorial operation, but because it is part of the lex fori in the wider sense, including the rules of private international law applied by it, that the lex fori in the narrower sense, i.e. in its purely internal aspect, governs the particular situation notwithstanding the existence of the foreign element."[35]

2.12 It may, nevertheless, remain necessary to decide whether a statute or rule of law made available by the rule in Phillips v. Eyre is in fact applicable in the circumstances of the case. For example, it may be that as a matter of construction a statute cannot be applied in the particular circumstances before the court: the principles of private international law cannot result in the application to events occurring abroad of a statute whose effect is as a matter of construction confined to events occurring here,[36] and the rule in Phillips v. Eyre does not mean that the tort is deemed to have occurred in the country of the forum. Thus, for example, a plaintiff in England may well not be able to base his claim upon breach of an English statutory duty, even if it corresponds exactly with a statutory duty imposed by the lex loci delicti. Conversely, there are certain types of English statute or rule which will apply in an

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34 On the "jurisdiction" theory of the rule in Phillips v. Eyre, the meaning of the word "actionable" may acquire a theoretical importance: see Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20.

35 Kemp v. Piper [1971] S.A.S.R. 25, 29, per Bray C.J.

36 See Hodgson, (1981) 55 A.L.J. 349, commenting on Walker v. W.A. Pickles Pty. Ltd. [1980] 2 N.S.W.L.R. 281; Dicey and Morris, p. 936, n. 67.

action on a foreign tort independently of the rule in Phillips v. Eyre. An English rule which is expressed to be or which the courts decide is of mandatory application will be applied in all actions in an English court notwithstanding any foreign element; and an English statute which contains its own choice of law rules might apply to a foreign tort as a matter of construction rather than through the medium of the rule in Phillips v. Eyre.[37] In addition, any matter which is classified for the purposes of private international law as procedural rather than substantive will always be determined by English law as the lex fori.[38]

2.13 It follows in particular from the first limb of the general rule that:

(a) no action will lie in England in respect of a class of tort unknown to English law;

(b) the plaintiff cannot recover in England in respect of a head of damage unknown to English law; and

(c) the defendant may make use of a defence which is available under English law even if it is not available under the lex loci delicti,[39] provided it is not confined to events which occurred in England.

Further, however, it is not sufficient for a foreign tort to be merely of a type known to English law, such as "negligence" or "trespass": it is necessary that the actual wrong be actionable under the internal law of England. This is illustrated in the field of proprietary rights by Potter v.

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37 See Howgate v. Bagnall [1951] 1 K.B. 265 and, generally, Dicey and Morris, pp. 14-23.

38 See generally, Dicey and Morris, ch. 35.

39 In Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20 the plaintiff's contributory negligence was a complete defence under the lex fori but a ground for apportionment under the lex loci delicti: the plaintiff's claim failed.

The Broken Hill Proprietary Co. Ltd.,[40] where it was held that an action brought in Victoria in respect of the alleged infringement in New South Wales of a New South Wales patent would not succeed, notwithstanding that the tort was of a type which was known to the law of Victoria: the patent law of Victoria did not apply to the infringement of the New South Wales patent since patents were local in their application.[41]

(b) The second limb of the general rule

> "The act must give rise to civil liability by the law of the place where it was done."

2.14 The early cases also appear to contain the origin of the second limb of the rule in Phillips v. Eyre. As originally formulated by Willes J., the requirement was that "the act must not have been justifiable by the law of the place where it was done".[42] It may be relevant that the early cases were mainly actions in trespass, and that in an action in trespass the defendant could plead that his alleged acts were justified in the circumstances.[43] If the occurrence had taken place abroad, it was permissible to show that the defendant's acts were "justified" according to the law of the place where the alleged tort had been committed, "[f]or whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried".[44] Further, the expression

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40 [1905] V.L.R. 612 (affirmed on other grounds, (1906) 3 C.L.R. 479).

41 See also Norbert Steinhardt & Son Ltd. v. Meth (1960) 105 C.L.R. 440: "No action could be maintained in England for an infringement of an Australian patent, or in Australia for an infringement of an English patent" (per Fullagar J. at p. 443). On proprietary and other rights, see Dicey and Morris, pp. 951-954.

42 Phillips v. Eyre (1870) L.R. 6 Q.B. 1, 29.

43 See Milsom, Historical Foundations of the Common Law (2nd ed., 1981), pp. 295-296. The same language is today used to describe a plea in confession and avoidance: "All matter justifying or excusing the act complained of must be specially and separately pleaded" (The Supreme Court Practice 1985, Vol. 1, notes 18/8/1, emphasis added); see also Odgers' Principles of Pleading and Practice (22nd ed., 1981), pp. 140-142, and Sutton, Personal Actions at Common Law (1929), p. 184.

44 Mostyn v. Fabrigas (1774) 1 Cowp. 161, 175; 98 E.R. 1021, 1029, per Lord Mansfield.

"justification" might be regarded as peculiarly apt in those older cases where the defendant's act was sanctioned by governmental or sovereign authority, as in Phillips v. Eyre itself.[45]

2.15 The meaning of this limb of the general rule as formulated by Willes J. in Phillips v. Eyre depends upon the interpretation of the phrase "not justifiable". In The Halley[46] it was assumed that the injury complained of must be actionable by the lex loci delicti. However, in Machado v. Fontes[47] the Court of Appeal held that the defendant's act was "not...justifiable", within the meaning of the second limb of the general rule, even if the lex loci delicti provided only for criminal liability, and not for civil liability. The liability provided for by the lex loci delicti therefore did not have to be co-extensive with, or even correspond to, the liability which was imposed by English law. It was enough that the act was not wholly innocent under the lex loci delicti.

2.16 It has also been held in Australia that the plaintiff may succeed in his action if the defendant's conduct was actionable merely in the abstract under the lex loci delicti, even though there was in fact, in the circumstances of the case, no liability of any kind under that law. On this view, the defendant's conduct might for the purposes of the second limb of the rule in Phillips v. Eyre remain actionable or not justifiable even though, for example, under the lex loci delicti the plaintiff's contributory negligence provided the defendant with a complete answer to the claim.[48]

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45 Cheshire and North, p. 269; Morris, The Conflict of Laws (3rd ed., 1984), p. 309.

46 (1868) L.R. 2 P.C. 193, 203.

47 [1897] 2 Q.B. 231.

48 Hartley v. Venn (1967) 10 F.L.R. 151, taking up suggestions made in Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20, 23, 28-29, 34-35, 43-44. The Australian interpretation of the second limb of the rule in Phillips v. Eyre is examined by Phegan in "Tort Defences in Conflict of Laws - The Second Condition of the rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

2.17 In Boys v. Chaplin the House of Lords considered what interpretation should be given to the requirement that the defendant's conduct should not have been "justifiable" by the law of the place where it was done. The facts and other aspects of the decision in Boys v. Chaplin will be considered in more detail below;[49] but, although it is not easy (or, perhaps, not possible) to extract a ratio decidendi from that case, it appears to be accepted that Machado v. Fontes has been overruled by Boys v. Chaplin,[50] and that instead the second limb of the rule in Phillips v. Eyre is now to be interpreted in England and Wales as a requirement that the defendant's conduct must in the actual circumstances of the case give rise to civil liability, as between the same parties, under the lex loci delicti.[51] Criminal liability is, therefore, no longer relevant, and the rule in Phillips v. Eyre is thus one of "double actionability", a term which we shall use throughout this paper. Nevertheless, any provision of the lex loci delicti which is regarded in England as being of a procedural nature only will be disregarded. It appears that it may not be necessary that the lex loci delicti should classify the defendant's conduct as tortious or delictual: it may be sufficient simply that the conduct gives rise to civil

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49 Paras. 2.23 - 2.36.

50 Doubts about Machado v. Fontes had already been expressed, particularly in Australia; see, for example, Varawa v. Howard Smith Co. Ltd. (No. 2) [1910] V.L.R. 509; Koop v. Bebb (1951) 84 C.L.R. 629.

51 [1971] A.C. 356, 377 per Lord Hodson, 381 per Lord Guest, 388-389 per Lord Wilberforce; Cheshire and North, p. 270; Dicey and Morris, pp. 941-942; Graveson, Conflict of Laws (7th ed., 1974), pp. 572-573; Morse, p. 62; and see John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917, 933-934; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 (C.A.) and also the later proceedings reported in The Times, 25 October 1977 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1146-1148, 1154. The proposition stated in the text has not yet been adopted in Canada; but in New Zealand the views of Lord Wilberforce were quoted with approval in Richards v. McLean [1973] 1 N.Z.L.R. 521, 525 (a case which, however, discusses jurisdictional and choice of law questions together). In Australia there appears so far to be no unanimity of view: see Phegan, "Tort Defences in Conflict of Laws - The Second Condition of the Rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

liability under that law, however the action would be classified.[52] However, it is probable that the right to receive compensation under a statutory compensation scheme (such as a Workmen's Compensation Act, or the scheme in force in New Zealand) is not enough.[53]

2.18 It is clear that the reference to the lex loci delicti in the second limb of the rule in Phillips v. Eyre is a reference only to the internal rules of that law, and not to its rules of private international law.[54] There is therefore no question of renvoi[55] in a tort case.

2.19 The effect of a requirement of civil liability under the lex loci delicti is thus to make available to the defendant in his action in England any substantive defences which exist under the lex loci delicti, in addition to his defences under English law; and if the events would not give rise to civil liability as between the same parties under the lex loci delicti, the fact that they would constitute a tort under English law will not assist the plaintiff.

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52 Boys v. Chaplin [1971] A.C. 356, 389F per Lord Wilberforce; Dicey and Morris, p. 942. This may not be the position in Scotland: see below, para. 2.42.

53 Walpole v. Canadian Northern Railway Co. [1923] A.C. 113 (P.C.); McMillan v. Canadian Northern Railway Co. [1923] A.C. 120 (P.C.); Going v. Reid Brothers Motor Sales Ltd. (1982) 35 O.R. (2d) 201, 210; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R 1136, 1143. See Webb and Auburn, (1977) 26 I.C.L.Q. 971, 988; Dicey and Morris, p. 942.

54 This was made clear by Lord Russell in the Scottish case of McElroy v. McAllister 1949 S.C. 110, 126; but it appears also from the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police per Bridge L.J. The decision is briefly reported at (1976) 120 S.J. 690.

55 "Renvoi" is a technical term of private international law, and is explained in the standard textbooks on the subject. It refers to the case where our choice of law rule selects a foreign law which would itself select, by its own choice of law rules, another law to decide the dispute. See Anton, pp. 55 ff.; Cheshire and North, pp. 60 ff.; Dicey and Morris, ch. 5; Morris, The Conflict of Laws (3rd ed., 1984), ch. 30.

2.20 It should be noted, however, that it is not necessary for the plaintiff to plead the existence of civil liability under the lex loci delicti: he may rest his case on the basis of English law alone, and leave it to the defence to raise any questions of foreign law.[56] If the defence does not do so, the case will be disposed of without any reference to foreign law.[57] Even if questions of foreign law are raised, there is a presumption that foreign law is the same as English law unless the contrary is proved as a fact.[58]

2.21 Finally, where different elements of a tort occur in different countries, it may become necessary to decide which is the locus delicti for the purposes of the second limb of the general rule. Although the language used by Willes J. may appear to indicate that for these purposes the locus delicti is the place where the actor acted, and not where the results occurred, the question has never been resolved in this context in England and Wales, although there are decisions concerned with applications for leave to serve process out of the jurisdiction, and there is also some further authority concerning torts allegedly committed in England.[59] We discuss the definition of the locus delicti in Part IV below,[60] and, in connection with a number of particular types of tort, in Part V.[61]

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56 Dicey and Morris, p. 968.

57 An example of this is Schneider v. Eisovitch [1960] 2 Q.B. 430, and see also Ichard v. Frangoulis [1977] 1 W.L.R. 556.

58 See generally Dicey and Morris, ch. 36.

59 John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917; White Horse Distillers Ltd. v. Gregson Associates Ltd. (1983) 80 L.S. Gaz. 2844.

60 Paras. 4.61 - 4.91.

61 Passim.

3. Summary

2.22 In England and Wales and in Northern Ireland the rule in Phillips v. Eyre may, therefore, be taken to mean that:

(a) the rights and liabilities of the parties to an action in England and Wales or in Northern Ireland on a foreign tort are determined by the lex fori, that is, the internal law of England and Wales or of Northern Ireland;

(b) the application of English or Northern Ireland law is subject to the qualification that the plaintiff's action in England and Wales or in Northern Ireland will succeed only to the extent that civil liability also exists, as between the same parties, under the lex loci delicti.

C. AN EXCEPTION TO THE GENERAL RULE: Boys v. Chaplin

1. When will the exception be used?

2.23 Boys v. Chaplin arose out of a motor accident in Malta. The motor scooter on which the plaintiff was riding collided with a car driven by the defendant, and the plaintiff sustained serious injuries. The accident was caused by the admitted negligence of the defendant. Both plaintiff and defendant were normally resident in England, but at the time of the accident were stationed temporarily in Malta as members of H.M. Forces.

2.24 Under English internal law, the plaintiff would have been entitled to special damages of £53, and also general damages of £2,250 in respect of pain, suffering, loss of amenities, and problematical future financial loss. By the law of Malta, on the other hand, the plaintiff was entitled only to the £53: the general damages were not available there. The only question for decision by the House of Lords was whether or not the plaintiff could recover the general damages in these circumstances.

2.25 The House of Lords decided unanimously that the plaintiff could recover the general damages, notwithstanding the provisions of

Maltese law. However, the House reached this conclusion for a "bewildering variety of reasons".[62] Although it is possible to extract from the speeches in the House of Lords a majority view on certain issues taken individually, those majorities are not all identically constituted, and no clear ratio decidendi emerges from the case as a whole.[63] Although (as we have seen), a measure of agreement has emerged with respect to some of the consequences of Boys v. Chaplin,[64] it is in these circumstances not possible to say with any certainty what the further effect of Boys v. Chaplin has been.[65]

2.26 It appears, however, to be agreed that Boys v. Chaplin has qualified the general rule in Phillips v. Eyre by permitting certain exceptions to the invariable application of that general rule, and thus introducing an element of flexibility (albeit of uncertain scope).[66] Nevertheless, no clear majority view on this point emerges from Boys v. Chaplin itself. Indeed, Lord Donovan expressly rejected any such notion,[67] although this rejection must be seen in the light of the fact that he, in common with Lord Guest, held that the plaintiff could recover damages on the English basis alone without any relaxation of the general rule since they were both of the view that the question of what heads of

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62 Cheshire and North, p. 265.

63 Cf. Briggs, "What did Boys v. Chaplin decide?" (1984) 12 Anglo-Am. L.R. 237.

64 See above, para. 2.17.

65 See Cross, Precedent in English Law (3rd ed., 1977), pp. 96-99; and the dictum of Viscount Dunedin in The Mostyn [1928] A.C. 57, 73-74.

66 Cheshire and North, pp. 277-278; Dicey and Morris, pp. 942-945; Morse, pp. 283-285; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 and also the later proceedings reported in The Times, 25 October 1977; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. Briggs disagrees: (1984) 12 Anglo-Am. L.R. 237, 245. Again, this development has not yet been followed in Canada, and there is no unanimous view in Australia.

67 [1971] A.C. 356, 383.

damage were available was a procedural matter.[68] Lord Donovan further took the view, which was shared by Lord Pearson, that Machado v. Fontes was rightly decided, and that civil liability under the lex loci delicti was therefore not required. Lord Pearson nevertheless appeared to contemplate exceptions to the general rule, however formulated. If, as was his view, the general rule required actionability under English law and only "non-justifiability" under the lex loci delicti, then an exception would be required to discourage forum-shopping. However, if (contrary to his view) the general rule was that the alleged wrongful act must be actionable both by the law of the place where it was committed and by the law of the forum (and, as has been suggested above at paragraph 2.17, this is the currently accepted view of the general rule), then Lord Pearson considered that "an exception will be required to enable the plaintiff in a case such as the present case to succeed in his claim for adequate damages".[69]

2.27 Lord Pearson did not, however, elaborate on that statement, and the basis of any exception to the general rule must therefore be derived largely from the speeches of Lord Hodson and Lord Wilberforce,[70] both of whom were of the view that in order to permit the plaintiff to recover the general damages which he sought it would be necessary to escape from the requirements of the second limb of the rule in Phillips v. Eyre. Both held that in the circumstances of the case the plaintiff should be permitted to recover damages which were not confined to those available under the lex loci delicti,[71] but it is not at all clear how this

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68 This view is not generally accepted. See below, para. 2.56.

69 [1971] A.C. 356, 406.

70 The views of Lord Wilberforce in particular were relied upon in Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 and in Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

71 [1971] A.C. 356, 378-380 per Lord Hodson, 391-392 per Lord Wilberforce.

exception would be applied in future cases. Both Lord Hodson and Lord Wilberforce cited[72] with approval the language of the United States Restatement Second[73] and both emphasised that the parties had little connection with Malta, where the accident happened.[74] Lord Wilberforce, especially, adopted an approach which took into account the particular issue in question and the policy of the foreign law.[75] However, in the absence of further authority, any consideration of the circumstances justifying a departure from the general rule must remain largely speculative.[76]

2. The nature of the exception

2.28 One difficulty about the Boys v. Chaplin exception is that it is not clear whether it must apply to the case as a whole, or whether it may be confined to one or more individual issues. If it applied to individual issues, and a case arose which presented two issues, it would be possible for one of those issues to be subjected to the rule in Phillips v. Eyre, and for the other to benefit from the Boys v. Chaplin exception. The language used by Lord Hodson[77] and especially by Lord Wilberforce[78] in

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72 Ibid., 380 per Lord Hodson, 391 per Lord Wilberforce.

73 Proposed official draft, May 1, 1968. The text of the final version is slightly different. Section 145(1) of the Restatement Second now reads as follows: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties ...".

74 [1971] A.C. 356, 380 per Lord Hodson, 392 per Lord Wilberforce.

75 Ibid., 392.

76 For a discussion, see Morse, pp. 285-295. In Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 it was argued, and the Court of Appeal agreed, that the facts that the plaintiffs were resident in England and that the defendant was an English police officer might justify the use of the exception; cf. Lord Denning M.R. in the later proceedings in the same case (The Times, 25 October 1977). See Collins, (1977) 26 I.C.L.Q. 480.

77 [1971] A.C. 356, 380B.

78 Ibid., 389 ff. and especially 391 ff.

Boys v. Chaplin appears to indicate that an individual issue may be isolated and accorded separate treatment, and this view of the exception has received some support.[79]

2.29 It would appear that an exception to the rule in Phillips v. Eyre might be invoked by a court as a means of arriving at one of the following three results, in respect either of the whole case or of one or more issues:

1. the application of English law alone (as in Boys v. Chaplin itself);
2. the application of the lex loci delicti alone;
3. the application of a third law alone.[80]

2.30 It is clear that Boys v. Chaplin makes possible the first result mentioned above. What is not clear is whether Boys v. Chaplin can be said to provide support for any particular method of arriving at that result; that is, for any particular view of the conceptual nature of the exception to the general rule. Whether or not the second and third results mentioned above can also be achieved depends upon the view which is adopted of the nature of the exception.

2.31 One method of arriving at the first result would be simply to disapply the second limb of the general rule (which requires civil liability to exist under the lex loci delicti). The case (or, perhaps, the issue) would thus be subject only to the first limb of the general rule, and English law would alone apply. This method could not achieve either of

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79 Dicey and Morris, p. 943; Morse, pp. 291 ff; and see Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

80 There is a fourth possible view of the exception, namely that the court would wish to retain the requirement of "double actionability" but that, instead of requiring civil liability to exist under the lex loci delicti, the court would substitute a requirement of civil liability under some third law. This view appears to have little support. Cf. McGregor, (1970) 33 M.L.R. 1, 12.

the other two results mentioned above.[81] Apart from Boys v. Chaplin itself (from which it would seem that in an appropriate case a majority of their Lordships would have concurred in the results of such reasoning), some further support for this approach may be derived from Church of Scientology of California v. Commissioner of Metropolitan Police[82] where Lord Denning said:

> " 'Double actionability' is the general rule. There are some exceptions however. There may be some cases in which it is sufficient that it [the tort committed in a foreign country] should be actionable in England only."[83]

2.32 In Boys v. Chaplin, however, Lord Hodson and Lord Wilberforce both used language which is wider than this. It is arguable that the exception which they envisaged was intended by them to constitute an exception to the whole of the general rule, and not just to its second limb.[84] This would mean that where the exception applied, the rule in Phillips v. Eyre would not apply at all. The case, or a particular issue, would instead be decided according (for example) to the law of the country with which the occurrence and the parties were most closely connected. According to the circumstances this might be either English law, or the lex loci delicti, or some third law. On this view of the exception, therefore, all three of the results mentioned above could be achieved.

2.33 However, it is far from clear that Boys v. Chaplin can be taken as authority for this wide approach. The first objection is that such an approach did not command majority support in that case. Secondly, this approach would effectively amount to the adoption of a

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81 McGregor, (1970) 33 M.L.R. 1, 12.

82 The Times, 25 October 1977.

83 This passage is taken from the transcript, not from the report in The Times.

84 See Dicey and Morris, pp. 942-945; Morse, pp. 283-285; Karsten, "Chaplin v. Boys: another analysis", (1970) 19 I.C.L.Q. 35.

version of the "proper law of the tort"[85] whenever, exceptionally, the general rule was not to apply; but the House of Lords in Boys v. Chaplin rejected the idea of adopting the proper law of the tort as the general choice of law rule,[86] and their reasons for doing so would seem to apply equally to the proper law of the tort even as an exception to the general rule. The recent case of Coupland v. Arabian Gulf Oil Co.[87] does not greatly illuminate this matter. Although Hodgson J. in that case suggested that it may be permissible, in relation to a particular issue, to apply in effect the "proper law of that issue", it is not clear whether he envisaged that it might be permissible to apply a law which was neither the lex fori nor the lex loci delicti. This possibility did not arise in that case, and the provisions of the lex loci delicti were in practice the same as English law. Hodgson J. clearly envisaged, however, that in a suitable case English law might not be applied.[88]

2.34 A third possible view of the exception to the rule in Phillips v. Eyre is that in an appropriate case the court might disapply either of the two limbs of that rule, and would in consequence apply either English law alone or the lex loci delicti alone. This method would achieve the first two, but not the third, of the three possible results mentioned above at paragraph 2.29. In Boys v. Chaplin there was, of course, no question of applying the lex loci delicti alone, and there is no express support for this

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85 This concept is discussed in Part IV below, at paras. 4.126 - 4.142.

86 [1971] A.C. 356, 381 per Lord Guest, 383 per Lord Donovan, 391 per Lord Wilberforce, 405-406 per Lord Pearson. Lord Hodson expressed himself more neutrally: ibid., 377-378.

87 [1983] 1 W.L.R. 1136. For a comment on this decision, see Morse, (1984) 33 I.C.L.Q. 449.

88 [1983] 1 W.L.R. 1136, 1149G.

view in that case. However, it might be attractive to a court which considered it to be in the interests of justice to apply the lex loci delicti, and which was therefore faced with having to choose between this method of doing so and the wider method outlined in the last two paragraphs.

2.35 There is, however, a difficulty with this approach. As has been stated above,[89] the general rule is that an action in England on a foreign tort is decided in accordance with English internal law, subject to the proviso that civil liability must exist under the lex loci delicti. To disapply the second limb of the general rule is simply to dispose of the proviso; the rule that the action is to be decided according to English law is left intact. Displacement of the first limb of the general rule leaves only the proviso, which in itself does not constitute a rule that the action is to be decided according to the lex loci delicti. In order to achieve that result it would therefore be necessary to do more than simply waive the requirements of the first limb of the general rule, but it might be that a court which considered the exclusive application of the lex loci delicti to be appropriate would be prepared to reformulate the rule so as to adopt such an approach.

2.36 In the result, therefore, the precise nature and extent of the new element of flexibility must remain speculative. There is no particular assistance to be derived from the Australian cases in which the element of flexibility has been accepted.[90] In those cases the lex loci delicti was displaced and the lex fori applied without restriction, but the facts of those cases suggest that this result would have been achieved on any view of the exception.

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89 Para. 2.22.

90 Warren v. Warren [1972] Qd. R. 386; Corcoran v. Corcoran [1974] V.R. 164.

The law of Scotland

2.37 Subject to the further explanations below, the present rule of Scots law is not dissimilar to that of England. If a question of choice of law is raised, a claimant suing in Scotland in delict in respect of an act which has occurred outside Scotland requires at least to demonstrate that the conduct complained of gives rise to civil liability both under Scots law and under the lex loci delicti.[91]

2.38 In Scotland, as in England, the initial disposition of the courts was to say that, because an action founded on a delict committed abroad had been brought in the Scottish courts, Scots law should be applied.[92] In Goodman v. London and N. W. Railway Co.,[93] however, a widow claimed solatium in respect of the death of her husband in a railway accident in England. Lord Shand found that the widow's claim was time-barred in England under the Fatal Accidents Act 1846 (Lord Campbell's Act). He considered the English decisions in The Halley[94] and in Phillips v. Eyre and decided that, since the pursuer no longer had any right of action under the lex loci delicti, she had no right of action in Scotland. He remarked:

> "But just as the lex loci contractus must be applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the lex loci must be applied with reference to the acts committed, in order to ascertain whether there be liability. It may be that it will not be enough that the pursuer shall be able to shew that the act committed in a foreign country gives a right of action there, and that the Courts of this country will not sustain an action founded on a foreign municipal law unless the claim is also consistent with the law of this country also. The case of the 'Halley' ... is an authority to that effect."[95]

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91 McElroy v. McAllister 1949 S.C. 110.

92 Horn v. North British Railway Co. (1878) 5 R. 1055. This decision was questioned in Naftalin v. L.M.S. Railway Co. 1933 S.C. 259 and overruled in McElroy v. McAllister 1949 S.C. 110.

93 (1877) 14 S.L.R. 449.

94 (1868) L.R. 2 P.C. 193.

95 (1877) 14 S.L.R. 449, 451.

Lord Shand went on to say:

> "But where the act is lawful according to the law of the country in which it is done, or where the act gives no cause or right of action there, I am of opinion that it cannot be treated as unlawful or as giving rise to a claim of damages in this country, should it happen that the person complained of either is or afterwards becomes subject to the jurisdiction of the Courts here. The present branch of the argument (which is taken on the footing that the pursuer cannot take any benefit by the English statute) involves the proposition, which appears to me to be extravagant, that an accident caused by the fault of the servants of an English railway company, which would in England give no right to compensation to the relatives of persons killed, would, notwithstanding, subject the company to claims of damages in the Courts of this country, provided the company happened to be from any cause liable to the jurisdiction of these Courts; in other words, an act inferring no legal liability in the country where it occurred might be made the ground of liability in this country, because of the accidental circumstance of the defenders being or becoming liable to the jurisdiction of the Courts here."[96]

2.39 The terms of Lord Shand's opinion are inconsistent with the approach implicit in Phillips v. Eyre, as interpreted in Machado v. Fontes,[97] that a foreign delict should be governed by the internal law of Scotland, subject to any defence of justification under the lex loci delicti.[98] An approach of this kind seemed appropriate to the court in McLarty v. Steele[99] where the pursuer claimed damages for a verbal slander uttered in Penang. Lord Moncrieff (with whom Lords Young and Rutherford-Clark concurred) remarked:

> "It may be the case that by English law redress will not be given for verbal slander unless special damage be proved, but it is certainly not the case that therefore verbal slander is lawful. We have thus

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96 Ibid.

97 [1897] 2 Q.B. 231.

98 See the discussion in paras. 2.15 - 2.16 above.

99 (1881) 8 R. 435.

here an admitted wrong, which is wrong both by the law of the place where it was committed and of the country where the action for redress is raised."[100]

The view, however, that actionability under the lex loci delicti is not a necessary condition of an action based on a delict committed abroad was inferentially disclaimed in such cases as the Rosses[101] and Evans v. Stein,[102] questioned in Naftalin v. L.M.S. Railway Co.,[103] and finally repudiated in McElroy v. McAllister.[104] In the last case Lord Justice-Clerk Thomson remarked:

"Insistence on the importance of the law of the forum has tended to lead both Scots and English law to the illogical conclusion that, whereas actionability in the forum is a sine qua non, a pursuer can invoke the Court of the forum without having to go so far as to establish actionability under the lex delicti. The persistent use of the word 'justification' in the English cases is symptomatic of this tendency. The high-water mark of this tendency in England is Machado v. Fontes, while in Scotland McLarty v. Steele seems to suggest that the commission of a moral wrong in the locus delicti is enough. In my view this tendency is wrong. Actionability under the lex loci delicti seems to me to be in principle a sine qua non. Otherwise a quite unjustifiable emphasis is given to the lex fori."[105]

2.40 As regards the role of the lex loci delicti, the decision in Naftalin put it beyond doubt that:

"The general rule of international law is that the rights of parties, in a case like the present, are regulated by the lex loci delicti."[106]

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100 Ibid., 436.

101 (1891) 19 R. 31.

102 (1904) 7 F. 65.

103 1933 S.C. 259.

104 1949 S.C. 110. We do not hereafter cite the reference to this case.

105 Ibid., 118.

106 1933 S.C. 259, 270 per Lord Anderson. This contrasts with the interpretation which is given to the English rule in Phillips v. Eyre, that the rights and liabilities of the parties arising out of a foreign tort are determined by the lex fori, subject only to the existence of civil liability between the same parties under the lex loci delicti: see paragraphs 2.8 - 2.22 above.

The decision in McElroy made the sense of the rule more explicit because, as Lord President Cooper declared:

> "When considering whether the act or omission complained of is 'actionable' by the lex loci delicti, the Scottish courts will not limit the inquiry to the question whether the act or omission is 'actionable' in the abstract, but will extend it to the further question - On whom does the lex loci delicti confer a jus actionis, and for what?"[107]

Thus in McElroy the court rejected a widow's claim to solatium for the loss of her husband under the common law of Scotland[108] because the right was an independent one of a substantive character unknown to the lex loci delicti. It is true that there is a passage in the judgment of Lord McDonald in Mitchell v. McCulloch[109] which suggests that the primary system involved is always that of the lex fori. He remarked:

> "What law therefore falls to be applied to a head of damages recognised by the lex loci delicti but disallowed by the lex fori as being too remote? In my opinion the lex fori is the appropriate law. This is not inconsistent with Naftalin and McElroy so long as it is remembered that the lex loci delicti has a part to play in that it may cut down or limit a right to damages otherwise exigible in the forum. In my opinion, however, it should not create or extend a right not recognised by the forum."[110]

The learned judge, however, in that passage was concerned to meet an argument by the pursuer that, the double actionability rule having been satisfied, all matters of heads of damage and remoteness of damage were exclusively matters for the lex loci delicti and that the role of the lex fori was merely to determine procedural matters, including the measure of damages. His remarks, it is thought, cannot be read as denying the general propositions established by the Whole Court in McElroy and in any future case, to the extent that they are inconsistent with those propositions, would fall to be ignored.

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107 1949 S.C. 110, 135.

108 Altered by the Damages (Scotland) Act 1976.

109 1976 S.L.T. 2.

110 Ibid., 5.

2.41 It is familiar law in Scotland that the assessment and mode of calculation of damages is a matter for the lex fori alone,[111] but the Scottish authorities also suggest that in actions in Scotland based on a delict alleged to have been committed abroad, not only must the conduct founded upon give rise to a claim under Scots law as well as under the lex loci delicti, but also the claim available under the lex loci delicti must be of the same kind as that which would have been available under Scots law, the lex fori, had the delict occurred in Scotland. In McElroy v. McAllister the widow claimed alternatively that she was entitled to damages under English law for pecuniary loss under the Fatal Accidents Acts. This claim was rejected on the ground that she had failed to make sufficiently specific averments of the effect of the relevant English law, but the judges (other than Lord Keith) appear to have taken the view that the specific jus actionis founded upon under the lex loci delicti must also be available to the pursuer under the lex fori. This view was confirmed in Mitchell v. McCulloch[112] where it was decided that the Scottish court could not give effect to a head of damage recognised by the lex loci delicti if it was not also recognised by the lex fori.[113] The distinction between liability in law to compensate certain types of loss and the manner of calculation of the loss is an old one, and was clearly made by Lord McLaren in Kendrick v. Burnett,[114] but it is not always easy to distinguish between questions of liability and questions of quantification. Though in Boys v. Chaplin Lord Guest[115] declared that solatium for personal injuries as distinct from solatium for the death of a relative was not a head of damage but merely an element in the quantification of

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111 This was a matter of concession in Mitchell v. McCulloch 1976 S.L.T. 2.

112 1976 S.L.T. 2.

113 This decision is examined and criticised by J.M. Thomson in "Delictual liability in Scottish private international law", (1976) 25 I.C.L.Q. 873.

114 (1897) 25 R. 82, 88.

115 [1971] A.C. 356, 382-383.

damages, he was the only member of the House to take that view[116] and his view is inconsistent with the approach of the Inner House in MacKinnon v. Iberia Shipping Co. Ltd.,[117] where, however, the point was not argued. The question may be an open one, but the better view would seem to be that any rule which indicates the type of loss for which damages are payable is a rule of substance, with the result that under the present law the rule of double actionability would apply to it.

2.42 The general rule of Scots law, following from McElroy v. McAllister, may be summarised by saying that, in order to found a successful claim in delict before a Scottish court, the conduct in question must give rise to the same right of action between the same parties, acting in the same capacities, under both the lex loci delicti and the lex fori. The action will succeed only to the extent that the specific heads of damage sought are recoverable under both systems of law. The predominant role, however, appears to be given to the lex loci delicti in determining the rights of parties but subject to the availability of the same type of claim under the lex fori. Although this seems to represent a reversal of the first and second limbs in Phillips v. Eyre, both the Scottish and the English versions of the double actionabililty rule will normally achieve the same result in practice. However, the somewhat different conceptual approach suggests (although we are not aware of any direct authority on the point) that, unlike the position in England and Wales,[118] the existence of contractual liability between the parties under the lex loci delicti is not sufficient to support an action in Scotland based on delictual liability.

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116. See Lord Hodson at p. 379D; Lord Wilberforce (with more hesitation) at p. 393B; Lord Pearson at p. 394G.

117 1955 S.C. 20.

118 See para. 2.17 above.

2.43 It should be noted that, if neither party raises questions of foreign law in his written pleadings, the Scottish court, in the words of Lord Hunter -

> "... is entitled to decide the case according to the law of Scotland, or, at any rate, to proceed upon the view that the lex loci delicti is the same as the law of Scotland."[119]

If, however, a party does found upon the lex loci delicti he must in his written pleadings make relevant averments of the content of that law.[120] It may be too late to do so after the closing of the record.[121]

2.44 The Scottish courts have rarely been called upon to consider which is the locus delicti in cases where different elements of the delict have occurred in different countries. The question does not appear to have arisen for decision in cases specifically involving the double actionability rule. What authority there is concerns delicts allegedly committed in Scotland and it is clear that the definition of the locus delicti can vary according to the nature of the delict in question.[122]

2.45 As we have seen, the general principle underlying the present law is that:

> "It is well settled ... that a pursuer suing in a Scots court in respect of a delict committed on the territory of a foreign country must

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119 Pryde v. Proctor & Gamble Ltd. 1971 S.L.T. (Notes) 18.

120 McElroy v. McAllister 1949 S.C. 110 per Lord Justice-Clerk Thomson at p. 118 and Lord President Cooper at p. 137; MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20.

121 Bonnor v. Balfour Kilpatrick Ltd. 1974 S.C. 223.

122 See Soutar v. Peters 1912 1 S.L.T. 111 (alleged seduction thought to have taken place in Scotland where the fraudulent capture of the pursuer's affections had been completed, although the subsequent act of intercourse did not take place until a few hours after she had left Scotland); Longworth v. Hope (1865) 3 M. 1049 (alleged slander in journal printed in England and circulated in Scotland held to have been committed in Scotland where the harm resulted, not in England where the defender had acted); John Walker & Sons Ltd. v. Douglas McGibbon & Co. Ltd. 1972 S.L.T. 128 (acts done in Scotland preparatory to passing-off abroad sufficient to justify intervention by a court in Scotland).

aver and prove that the remedy sought is available both under the law of that foreign country and under the law of Scotland."[123]

The question, however, arises whether there are admitted exceptions to this general principle, particularly in view of the dicta of the House of Lords in Boys v. Chaplin. The matter is of particular interest in the context of events occurring in an "insulated environment" where the connection with a foreign system of law is largely adventitious. The case of MacKinnon v. Iberia Shipping Co. Ltd.[124] arose because a ship's engineer in the course of his employment on the S.S. "Baron Ramsay" received injuries which he claimed were occasioned by the negligence of its owners or of a fireman for whom they were responsible. At the relevant time, however, the "Baron Ramsay" was lying at anchor in the territorial waters of the Dominican Republic (or "San Domingo"). The court held that this fact involved that the locus delicti was San Domingo, and declared, following the decision in McElroy v. McAllister, that the pursuer's claim to soiatium for pain and suffering could only succeed if such a claim were admitted both by the law of San Domingo and that of Scotland. Counsel for the pursuer, however, argued inter alia that, so long as the events complained of were entirely internal to the vessel, there was nothing to support the view that the locus of the occurrence was the littoral territory, whatever its extent or extension. Lord Carmont, who gave the leading judgment, said that there was much to be said for this argument from a practical and commonsense point of view and Lord Sorn remarked:

"... to apply the law of the geographical locus delicti produced results which had an element of absurdity. Did it contribute anything to the comity of nations that a Glasgow man, injured in the engine room of a Glasgow ship whilst on a voyage, should have his rights determined by the law of San Domingo in an action raised in this country when he got home? In the present case the ship was anchored in territorial waters, but, if the lex loci is to be applied here, it is to be assumed that it would also have to be applied even where the ship was only in course of passage through such waters. To the objection that the introduction of a distinction between external and internal acts would involve an additional, and perhaps troublesome, question in determining the choice of law, Mr Kissen

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123 MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20, 34 per Lord Russell.

124 1955 S.C. 20.

was able to point out that the distinction already had received some recognition in connexion with quasi-delict committed on the high seas - Dicey, (6th ed.) p.805; Cheshire, (4th ed.) p.272. The force of Mr Kissen's argument has impressed me, and re integra there would be much to be said for adopting the rule he suggests. I have, however, not found it possible to treat the matter as being an open question. The rule that the lex loci delicti applies to territorial waters appears to me to have stood for a long time without any distinction being drawn between one kind of act and another."[125]

2.46 A similar issue was raised in Boys v. Chaplin which, as a decision of the House of Lords, would normally be a highly persuasive authority in a matter of Scottish private international law. But, as Lord McDonald indicated in Mitchell v. McCulloch,[126] it is not -

"... easy to extract a principle from this case since the grounds of decision, although all leading to the same conclusion, vary between the judges."

Lord Guest, in Boys v. Chaplin, considered that Naftalin v. L.M.S. Railway Co.[127] and McElroy v. McAllister were rightly decided.[128] The remaining judges, however, other than Lord Donovan, all recognised that the rigid application of such a double actionability rule may create injustice, and suggested different devices for departing from that rule.[129] This leaves the present law of Scotland in some uncertainty because Boys v. Chaplin, being an English case, is not binding in Scotland. Its authority, however, might well be prayed in aid to modify the Scottish rule in appropriate cases.

Torts or delicts committed in a single jurisdiction within the United Kingdom

2.47 Subject to the proviso mentioned in the following paragraph, it appears to be universally agreed that, notwithstanding the existence of a

125 Ibid., 36-37.

126 1976 S.L.T. 2, 4.

127 1933 S.C. 259.

128 [1971] A.C. 356, 381.

129 We discuss Boys v. Chaplin in more detail at paras. 2.23 - 2.36 above.

foreign element, a tort committed in England and Wales will, in an action in England and Wales, be governed by English law only;[130] and it may be that a corresponding rule applies in Scotland.[131] A corresponding rule would probably be held to prevail also in Northern Ireland. It would appear that "England and Wales", "Scotland" and "Northern Ireland" include the adjacent territorial waters,[132] although in the case of a statute it is necessary to decide whether the statute applies to events taking place there.[133]

2.48 However, it does not appear ever to have been decided whether the rules in Phillips v. Eyre and McElroy v. McAllister simply do not apply at all to torts and delicts committed in the country of the forum, or whether those rules do apply but result in the exclusive application of the lex fori because the lex loci delicti in such a case is the same as the lex fori.[134] The distinction between these possibilities was of no consequence until the creation in Boys v. Chaplin of an exception to the rule in Phillips v. Eyre. Since then the distinction has acquired some theoretical significance in England and Wales and in Northern Ireland for, if the Boys v. Chaplin exception is capable of resulting in the application of a third law which is neither the lex fori nor the lex loci delicti,[135] and

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130 Dicey and Morris, p. 927. The case usually cited in support of this proposition is Szalatnay-Stacho v. Fink [1947] K.B. 1 (C.A.).

131 Walker, The Law of Delict in Scotland (2nd ed., 1981), p. 57.

132 Brodin v. A/R Seljan 1973 S.L.T. 198, discussed below at paras. 2.94 - 2.96.

133 For example, The Saxonia (1862) Lush. 410, 167 E.R. 179.

134 Graveson's view is that in such a case "the issue does not concern the conflict of laws": Conflict of Laws (7th ed., 1974), p. 568, but for the view that the double actionability rule does apply see Cheshire and North, pp. 284-285, and see also Dicey and Morris, p. 944. This point was not raised in Szalatnay-Stacho v. Fink [1947] K.B. 1.

135 As to which see above, paras. 2.29 - 2.36.

if the choice of law rule in tort does apply to events which occurred within the jurisdiction of the forum, then the lex fori could in theory be displaced in favour of a third law. This seems unlikely to happen, and the point is not relevant at all in Scotland so long as the rule in McElroy v. McAllister permits of no exception.

Particular consequences of the rules in Phillips v. Eyre and McElroy v. McAllister

A. INTRODUCTION

2.49 This Part of our consultation paper has so far discussed the present law in general terms. We now proceed to consider briefly the operation of the present law in the context of some particular issues which have given rise to problems. There are two question which arise in connection with each of the issues discussed in this section. The first is whether or not it is the law selected by our choice of law rule in tort and delict which applies to the issue. If the issue were regarded, not as an issue in tort or delict, but as belonging to a different category (for example, as contractual in nature) then it would be some other choice of law rule, and not the choice of law rule in tort or delict, which selected the law appropriate to govern the issue. It is therefore important to know how each issue should be classified for choice of law purposes, but such classification may be a matter of difficulty.

2.50 The second question which may arise is whether or not the issue should be regarded as procedural or as substantive.[136] Any matter which is regarded here as procedural only will be governed by the lex fori to the exclusion of any foreign law. Further, even where an issue was properly classified as tortious or delictual in nature, any provision of the lex loci delicti which was regarded here as procedural would be ignored in an action in a court in the United Kingdom.

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136 See Dicey and Morris, ch. 35.

2.51 It is primarily the first question with which this section is concerned. We have thought it most convenient to confine our discussion to the operation of the English rule in Phillips v. Eyre (as interpreted in Boys v. Chaplin) and of the Scottish rule in McElroy v. McAllister as they relate to the particular issues considered; except to the extent that the contrary appears, we have not discussed the possible effect of the exception to the English rule created in Boys v. Chaplin. It should be recalled, however, that the Boys v. Chaplin exception is of general application, and might in an appropriate case modify a result arrived at by means of the general English rule.

2.52 As has appeared from the foregoing discussion, the law of England and Wales and the law of Scotland differ in the emphasis which they give to the lex fori and the lex loci delicti. In England and Wales the former is of greater importance, in Scotland the latter. For the sake of convenience, however, where we refer in the succeeding paragraphs to the "first limb" of the rule in Phillips v. Eyre or McElroy v. McAllister, we mean in both cases the limb which applies the lex fori; where we refer to the "second limb" we mean the limb which applies the lex loci delicti.

B. THE ISSUES

1. Vicarious liability

2.53 Cases involving vicarious liability show that in England and Wales this issue is one to which the choice of law rule in tort applies,[137] and that the claimant's action will therefore fail unless the defendant is vicariously liable under both the lex fori and the lex loci delicti.[138] The law is probably the same in Scotland.

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137 The Halley (1868) L.R. 2 P.C. 193; The M. Moxham (1876) 1 P.D. 107; O'Connor v. Wray [1930] 2 D.L.R. 899; Joss v. Snowball [1970] 1 N.S.W.R. 426; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690. See Dicey and Morris, p. 958.

138 It may be particularly difficult for the claimant to succeed in a vicarious liability case, as is illustrated by Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690: see Collins, "Vicarious liability and the conflict of laws", (1977) 26 I.C.L.Q. 480.

2. Defences

2.54 The double actionability rule implies, both in England and Wales and in Scotland, that the wrongdoer may rely in his defence on any available rule of the lex fori, and also on any substantive rule available to him under the lex loci delicti.[139]

2.55 One defence which has given rise to problems is that of contributory negligence. Although any observations on the effect of contributory negligence in the application of the general rule must remain speculative in the absence of English or Scottish authority, there would appear to be no reason to doubt that this defence will be subject to the general choice of law rule in tort and delict.[140] Thus where under the lex loci delicti contributory negligence by the claimant still constitutes a complete defence to his action, it would follow from the second limb of the general rule that the claimant's action in a court in the United Kingdom would fail, regardless of the fact that under our own law the only consequence would be a reduction in the damages recovered.[141]

3. Damages

2.56 It is clear that "[t]he law relating to damages is partly procedural and partly substantive".[142] In J. D'Almeida Araujo Lda. v.

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139 Cheshire and North, p. 278; Dicey and Morris, p. 961; Morse, pp. 179-180.

140 Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20.

141 Law Reform (Contributory Negligence) Act 1945 (as amended), which applies both to England and Wales and to Scotland. Cases to the contrary in Australia (Hartley v. Venn (1967) 10 F.L.R. 151, and see also Kolsky v. Mayne Nickless Ltd. [1970] 3 N.S.W.R. 511) and in Canada (Brown v. Poland and Emerson Motors Ltd. (1952) 6 W.W.R. (N.S.) 368 and LaVan v. Danyluk (1970) 75 W.W.R. 500) are not inconsistent with this since they were decided on the basis that the conduct complained of had merely to be "not justifiable" in the locus delicti, and did not have to give rise to civil liability there.

142 Boys v. Chaplin [1971] A.C. 356, 379 per Lord Hodson.

Sir Frederick Becker & Co. Ltd.[143] (a case of contract), a distinction was drawn between, on the one hand, remoteness of damage and, on the other hand, the monetary quantification or assessment of damages. It was held that the latter is classed as procedural, and is governed by the lex fori in any event. Questions of remoteness and heads of damage, however, are matters of substance, and are governed by the system of law selected by the relevant choice of law rule. Since Boys v. Chaplin it seems clear that in England and Wales the same distinction also applies in the field of tort. In Boys v. Chaplin the particular question which arose was this: was it necessary, before the plaintiff could recover general damages in England, that the same head of damage should be available under the lex loci delicti?[144] In other words, was the question whether general damages were obtainable a matter of substance, to which the rule in Phillips v. Eyre would be applied, or a matter of procedure, to be governed by English law as the law of the forum? It would seem from Boys v. Chaplin that the issue should be treated as substantive rather than procedural; and that, therefore, under the general rule in Phillips v. Eyre (we are not here considering any exception to the general rule) a plaintiff

143 [1953] 2 Q.B. 329.

144 The question arose because, as has been mentioned above (para. 2.24), damages for pain and suffering were available in England, but not under the lex loci delicti, which was Maltese law.

in England is not permitted to recover damages under a head which is not available under the lex loci delicti.[145] The rule appears to be the same in Scotland.[146]

4. Limitations on recovery

2.57 A rule of English or Scottish law imposing a ceiling on the amount of damages recoverable will take effect in England and Wales or in Scotland respectively in an action on a foreign tort or delict. It is not established whether u r the second limb of the general rule in Phillips v. Eyre or McElroy v. McAllister any similar ceiling imposed under the lex loci delicti could further restrict the damages available. The outcome might depend on whether the foreign ceiling extinguished the right to

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145 Cheshire and North, pp. 280-281; Dicey and Morris, pp. 966-967; Boys v. Chaplin [1971] A.C. 356, 379D-F per Lord Hodson; 392F-393B per Lord Wilberforce (who preferred to state at p. 389C-D as "the broad principle" that "a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed"); 395A-B per Lord Pearson, who said that "it would be artificial and incorrect to treat the difference between the English law and the Maltese law, which materially affects the determination of the rights and liabilities of the parties, as a matter only of procedural law". It should, however, be noted that in Lord Pearson's view Machado v. Fontes was right, and therefore the plaintiff would in any event have recovered damages in accordance with English principles only. Briggs disagrees with the proposition stated in the text: (1984) 12 Anglo-Am. L.R. 237, and a dictum of Henry J. in Going v. Reid Brothers Motor Sales Ltd. (1982) 35 O.R. (2d) 201, 211 is also inconsistent with it. The interpretation of the second limb of the rule in Phillips v. Eyre is not the same in Australia as it is in England, and the Australian position is not entirely clear: Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R. 143; Kemp v. Piper [1971] S.A.S.R. 25. See Phegan, "Tort Defences in Conflict of Laws -The Second Condition of the Rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

146 Naftalin v. L.M.S. Railway Co. 1933 S.C. 259, 273-274 per Lord Murray; McElroy v. McAllister 1949 S.C. 110, 134-135 per Lord President Cooper; MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20.

damages over the maximum or merely prevented their recovery, since in the former case the foreign provision might be regarded as substantive, but in the latter as procedural.

2.58 An indication that an English court might be prepared to classify such a ceiling as substantive is provided by Turner L.J. in Cope v. Doherty,[147] in which case and in The Wild Ranger[148] it was held that the limitation of liability provided for by section 504 of the Merchant Shipping Act 1854 did not extend to foreign ships on the high seas. Although the ultimate successor to that section[149] does so extend,[150] it is not clear whether it can be applied to the exclusion of the lex loci delicti to an occurrence in foreign territorial waters, or whether a lower limitation of liability provided for under the lex loci delicti could under the second limb of the general rule in Phillips v. Eyre or McElroy v. McAllister serve to reduce further the maximum liability.

5. Prescription and limitation of actions

2.59 When the Foreign Limitation Periods Act 1984 is brought into force, it will no longer be material in an action in England and Wales whether a foreign limitation period is regarded as substantive or procedural: subject to certain exceptions it will be taken into account whichever is the case.[151] An action in England and Wales on a foreign

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147 (1858) De G. & J. 614, 626; 44 E.R. 1127, 1132.

148 (1862) Lush. 553; 167 E.R. 249.

149 Merchant Shipping Act 1894, s.503, which will be replaced by the Merchant Shipping Act 1979, s.17, when the latter is brought into force.

150 The Amalia (1863) 1 Moo. P.C. (N.S.) 471, 15 E.R. 778, decided under the Merchant Shipping Act Amendment Act 1862, s.54, the immediate predecessor of the Merchant Shipping Act 1894, s.503. Cf. Sundström, Foreign Ships and Foreign Waters (1971), pp. 65-66, where the proposition in the text is doubted.

151 Foreign Limitation Periods Act 1984, s.1(1),(2). See (1982) Law Com. No. 114, Cmnd. 8570, paras. 4.13, 4.14 - 4.17.

tort will therefore fail after the expiry of the shorter of the English and the foreign limitation period. It is intended that the law in Northern Ireland should be to the like effect.[152]

2.60 In an action in Scotland, it is not wholly clear whether the Scottish court in applying the internal law of the lex loci delicti should apply also its rules of limitation of actions which might otherwise fall to be ignored as being merely of a procedural character. In Goodman v. London and N.W. Railway Co.[153] Lord Shand, construing the English provision for himself, suggested that section 3 of the English Fatal Accidents Act 1846 imported in its terms an inherent temporal limitation or qualification of the right conferred. The same view was taken by Lord Russell in McElroy v. McAllister where he remarked:

> "... inasmuch as the statute which gives the right of action expressly limits the endurance of that right, the right itself and the cause of action which it is designed to enforce both cease to exist at the expiry of the period of endurance where, as here, an action has not been commenced within that period. In other words the effect of the so-called time limitation is to extinguish at its expiry the liability of the defender."[154]

These remarks, however, should be read in their limited context and with reference to the requirements of averment and proof of the relevant foreign law referred to by Lord President Cooper in the same case.[155] The Prescription and Limitation (Scotland) Act 1984 now provides,[156] in general, for the application of the limitation period of a foreign lex causae. This rule, however, does not apply where there is more than

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152 Hansard (H.C.), 7 March 1984, vol. 55, col. 589.

153 (1877) 14 S.L.R. 449, 450.

154 1949 S.C. 110, 127.

155 Ibid., 137.

156 Section 4. The Act (which came into force on 26 September 1984) implements the Scottish Law Commission's Report on Prescription and the Limitation of Actions (Scot. Law Com. No. 74 (1983)).

one law governing the obligation in question. Hence it does not apply in actions before a Scottish court arising out of a foreign delict. In these actions, it is still necessary for the court to decide whether the foreign limitation rule should be applied as a substantive rule, in which case the end result is the same as in England and Wales,[157] or whether it should be characterised as procedural only, in which case it would seem that it could be ignored.

6. Transmission of claims on death: the survival of actions

2.61 There are two circumstances in which the question of survival of actions may arise. The first is where the claimant dies: the question then is whether the action may be pursued by his personal representatives for the benefit of his estate. This is known as the "active transmission" of claims. The second is where the wrongdoer dies, in which case the question is whether his estate remains liable. This is known as the "passive transmission" of claims. We consider these two categories together. In both categories two different questions arise: first, whether the action survives at all; and secondly, if it does survive, who may represent the estate of the deceased in an action in a court in the United Kingdom.

(a) The law of England and Wales and of Northern Ireland[158]

2.62 There appears to be no English authority on the survival of tort actions in private international law,[159] and neither the statute embodying the present English domestic law[160] nor the corresponding

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157 See para. 2.59 above.

158 See Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1.

159 These matters could have been raised, but were not, in Howgate v. Bagnall [1951] 1 K.B. 265. The issue might have arisen in Batthyany v. Walford (1887) 36 Ch. D. 269 (C.A.), but the claim in that case was classified as contractual rather than tortious in nature.

160 Law Reform (Miscellaneous Provisions) Act 1934, s.1 (as amended).

Northern Ireland statute[161] (which permit both passive and active transmission) provides any assistance. To regard the issue of whether or not an action survives as merely procedural does not seem supportable, but in the absence of authority it has been suggested by some that the issue should not be classified as one in tort.[162] However, the Australian case of Kerr v. Palfrey[163] (a case of passive transmission) does appear to treat the question as an issue in tort and therefore as subject to the rule in Phillips v. Eyre.[164] If this is so, a claim in England which depends for its success upon the survival of a cause of action will succeed only if the action survives under the lex loci delicti as well as under English law. However, who ultimately benefits from, or stands to lose by, the survival of an action will not be a matter for the applicable law in tort. This will be regulated by the law which governs succession to the moveable estate of the deceased.

2.63 It would seem that the question of who may sue or be sued on behalf of the estate of the deceased is a procedural matter which would therefore be regulated by English law alone. This would imply (a) that it would not be necessary for a person representing the estate of the deceased, whether as plaintiff or as defendant,[165] to be appointed to that capacity under the lex loci delicti or indeed any law other than the lex fori, but (b) that (if plaintiff) he would have to obtain a grant of probate or letters of administration in England even if he had also done so under the lex loci delicti or any other law.[166]

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161 Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937, s.14 (as amended).

162 See, for example, Dicey and Morris, pp. 955-956 (active transmission), 959-960 (passive transmission). This point is discussed at paras. 6.24 - 6.32 below.

163 [1970] V.R. 825.

164 The reasoning in Kerr v. Palfrey is, however, not entirely satisfactory: see Morse, pp. 161-162, and n. 177 below.

165 Morse, pp. 161-162.

166 The same question arises in the context of an action for wrongful death. See paras. 2.67 ff. below.

(b) The law of Scotland

2.64 The law relating to transmission of rights by a deceased person to his executors is now contained in sections 2 to 6 of the Damages (Scotland) Act 1976, which contains no choice of law rules.

2.65 Before the 1976 Act, the general rule in Scotland was that a right of action vested in any person was not extinguished by his death. His executors, therefore, could prosecute any claim on his behalf in so far, at least, as it related to the period up to the date of death. This principle applied to any claim for patrimonial loss but, by way of exception, did not apply to any claim the deceased might himself have had for solatium for personal injuries. In relation to such a claim the executors had a title to sue only if the deceased had raised an action of damages in respect of the claim before his date of death.[167] The 1976 Act alters the law by providing that the deceased's right to recover solatium in respect of personal injuries should not transmit to his executors, even when during his life the deceased had commenced an action to this effect.[168]

2.66 There is no satisfactory authority as to the application in situations involving a foreign element either of the common law rules on this matter or of those embodied in the 1976 Act. In the case of McElroy v. McAllister the pursuer inter alia claimed that as executrix she was entitled under the English Law Reform (Miscellaneous Provisions) Act 1934 to damages in respect of the funeral expenses and the loss caused by the death of her husband. The claim for funeral expenses was conceded and argument confined to the claim for loss of expectation of life. This claim was dismissed by Lord Justice-Clerk Thomson on the ground that -

> "Actionability by the law of the forum is a sine qua non. The executrix could not have insisted in this claim had she been suing in respect of a wrong committed in Scotland";[169]

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167 See Stewart v. L.M.S. Railway Co. 1943 S.C. (H.L.) 19.

168 1976 Act, s.2(3)(a).

169 1949 S.C. 110, 118.

and on similar grounds by Lord President Cooper and by Lords Carmont and Jamieson.

7. Wrongful death as a cause of action

(a) Introduction

2.67 Under the common law of England and Wales the principle was that "[i]n a civil Court, the death of a human being could not be complained of as an injury".[170] Exceptions to this rule were created in the Fatal Accidents Acts 1846 to 1959. These were consolidated by the Fatal Accidents Act 1976, but until that Act was amended by section 3 of the Administration of Justice Act 1982, the Fatal Accidents Acts were designed to compensate relatives for the economic loss they had suffered and not to afford a solatium to them. The common law of Scotland, on the other hand, has for long conceded to a limited class of relatives both compensation and a solatium. These differences between the systems occasioned choice of law problems. Since the passing of the Damages (Scotland) Act 1976, the law of both countries is statutory. The law of Northern Ireland on this question has developed in the same way as the law of England and Wales.

2.68 The questions which arise in this context are similar to those which arise in that of the survival of actions and, since neither the Fatal Accidents Act 1976 nor the Damages (Scotland) Act 1976 contains conflict rules, any question as to choice of law in the case of an action in the United Kingdom in respect of a fatal accident which occurred abroad is probably governed by the common law on the subject.

(b) The law of England and Wales and of Northern Ireland

2.69 There appears to be no English authority directly in point, either as to whether the Fatal Accidents Act 1976 will be applied in any action in an English court irrespective of any foreign element; or (if not)

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170 Baker v. Bolton (1808) 1 Camp. 493, 170 E.R. 1033, per Lord Ellenborough.

as to the choice of law rule to be applied.[171] Neither is there any such Northern Ireland authority under the corresponding Fatal Accidents (Northern Ireland) Order 1977.

2.70 However, cases in Australia[172] and in Canada[173] under legislation similar to the English Fatal Accidents Act seem to show that the legislation there under consideration could not apply to events occurring abroad without the invocation of an independent choice of law rule. Further, the Australian decisions[174] indicate that the existence or not of a cause of action under the Fatal Accidents legislation is a matter of substance; that the action is in the nature of an action in tort; that, accordingly, the general rule in Phillips v. Eyre will apply; and that, therefore, under the first limb of the general rule, the action is brought under the Fatal Accidents legislation of the forum, not that of the locus delicti.

2.71 It would seem to follow also from the second limb of the general rule in Phillips v. Eyre that an action in England under the Fatal Accidents Act 1976 in respect of a fatal accident which occurred abroad will succeed only if the beneficiaries of that action would also have benefited from the equivalent action brought under the lex loci delicti. However, this proposition is consistent only with the first of two alternative analyses of the law given in Koop v. Bebb[175] (an action in

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171 Both Davidsson v. Hill [1901] 2 K.B. 606 and The Esso Malaysia [1975] Q.B. 198 concerned accidents at sea, to which different rules apply: see below, paras. 2.106 ff. The question was not raised in Finnegan v. Cementation Co. Ltd. [1953] 1 Q.B. 688 (see below, para. 2.73) or in Schneider v. Eisovitch [1960] 2 Q.B. 430, which is occasionally cited in this context.

172 Koop v. Bebb (1951) 84 C.L.R. 629; Kolsky v. Mayne Nickless Ltd. [1970] 3 N.S.W.R. 511; Kemp v. Piper [1971] S.A.S.R. 25.

173 Couture v. Dominion Fish Co. (1909) 19 M.R. 65; Johnson v. Canadian Northern Ry. Co. (1909) 19 M.R. 179; Young v. Industrial Chemicals Co. Ltd. [1939] 4 D.L.R. 392.

174 See n. 172 above.

175 (1951) 84 C.L.R. 629.

Victoria in respect of a fatal accident which had occurred in New South Wales). The second, and inconsistent, alternative was that the Victorian statutory provision corresponding to section 1 of the Fatal Accidents Act 1976 -

> "... may be regarded as giving a right of action in Victoria whenever the condition is fulfilled that the deceased person (if he had survived) would have been entitled by the law of Victoria, including its rules of private international law, to recover damages for the act, neglect, or default which caused his death."[176]

2.72 According to this second view, therefore, the rule in Phillips v. Eyre would be applied, not to the actual claim and the actual parties before the court, but to the hypothetical claim of the deceased against the wrongdoer. The rules of private international law would cease to be relevant once it was established that the deceased could successfully have sued the wrongdoer in an action at the forum. The existence or absence of a Fatal Accidents Act or its equivalent at the locus delicti would, on this view, be irrelevant, as would the provisions of any such legislation as did in fact exist there. This view seems to be based on a mistaken interpretation of the rule in Phillips v. Eyre as it applies to such cases.[177]

2.73 The question who in England may bring an action under the Fatal Accidents Act 1976 in respect of a fatal accident which occurred abroad would seem to raise a procedural matter to which the rule in Phillips v. Eyre would not apply.[178] Those persons are specified in section 2 of the Act. It would therefore appear that a person suing as executor or administrator should not have to obtain a grant of probate or

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176 Ibid., 641.

177 See Dicey and Morris, pp. 954-955 and especially nn. 18 and 23; Morse, p. 162. The reason why Kerr v. Palfrey [1970] V.R. 825, cited above at para. 2.62 and nn. 163, 164, may be regarded as an unsatisfactory case is that it appears at pp. 828-829 also to adopt this view in the context of the transmission of claims on death.

178 The same point arises here as arose in connection with the survival of actions: see above, para. 2.63.

letters of administration in the country of the locus delicti,[179] or, indeed, anywhere else except in the country of the forum. However, Finnegan v. Cementation Co. Ltd.[180] indicates that a person who wishes to bring an action as administrator must take out letters of administration in England, even if foreign letters of administration have been taken out as well.[181]

(c) The law of Scotland

2.74 In Scotland there is ample authority upon the choice of law aspects of the common law rules which accorded to certain classes of near relatives a right to recover solatium (or damages for injury to the feelings) and patrimonial loss. The cases of Goodman v. London and N.W. Railway Co.,[182] Naftalin v. L.M.S. Railway Co.[183] and McElroy v. McAllister were all concerned with claims to solatium in respect of the death of a relative occurring in an accident outside Scotland. The cases suggest that such a claim for solatium by relatives is to be regarded not as an element of quantification in a general claim for damages but as a claim in respect of a separate substantive right. If it is unknown to the lex loci delicti (as will usually be the case) it will not be admitted.[184]

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179 Young v. Industrial Chemicals Co. Ltd. [1939] 4 D.L.R. 392 is to the contrary. So are two other Canadian cases, which were however decided on different premises: in Couture v. Dominion Fish Co. (1909) 19 M.R. 65 and Johnson v. Canadian Northern Ry. Co. (1909) 19 M.R. 179 the court held that the cause of action arose out of the fatal accidents legislation of the locus delicti, not that of the forum. See Dicey and Morris, pp. 954-955.

180 [1953] 1 Q.B. 688.

181 In Byrn v. Paterson Steamships Ltd. [1936] 3 D.L.R. 111, which is apparently to the contrary, letters of administration could not in the circumstances have been granted at the forum, since the deceased (who was domiciled and resident abroad) had left no property there. The report does not say where the tort occurred.

182 (1877) 14 S.L.R. 449.

183 1933 S.C. 259.

184 See the fuller discussion at paras. 2.37 ff. above.

2.75 There have been no reported cases upon the application of the Damages (Scotland) Act 1976 in situations involving questions of private international law. This Act distinguishes clearly between the claims of the deceased's relatives[185] and those of his executors. All relatives have a claim for damages for loss of support under section 1(3) but, if the relative is a member of the deceased's immediate family within the meaning of section 10(2) of the Act, the court may also make a "loss of society award", i.e. a sum in damages to compensate the relative "for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died".[186]

2.76 There seems little doubt that, in cases where the lex loci delicti is that of a country outside Scotland, the Scottish courts would apply to the loss of society award principles similar to those which they have evolved in the context of solatium.

8. Husband and Wife

2.77 At common law, throughout the United Kingdom, neither party to a marriage could bring an action in tort or delict against the other, but this has no longer been so since the Law Reform (Husband and Wife) Act 1962 or the Law Reform (Husband and Wife) Act (Northern Ireland) 1964. However, there is no English, Northern Ireland or Scottish authority on the question whether the 1962 Act or the 1964 Act applies as a matter of construction or policy to torts or delicts which have occurred abroad; or on the question what choice of law rule is to apply to the issue of interspousal immunity.

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185 Defined in Schedule 1 of the Act.

186 Section 1(4).

2.78 Decisions in Australia have treated interspousal immunity as a matter of substance rather than of procedure.[187] Further, in Warren v. Warren[188] the issue was held not to be subject to the general rule in Phillips v. Eyre. That case concerned parties who were domiciled in Queensland, where the action was brought, and where there was in force a statutory provision[189] permitting an action by one spouse against the other. Such an action was prohibited by the law of New South Wales,[190] where the motor accident which was the subject of the action had occurred. In these circumstances Matthews J. held that the question whether the wife could bring an action against the husband was to be referred to the law of their domicile, and should not be governed by the general rule in Phillips v. Eyre.

2.79 In the alternative, Matthews J. considered the issue as one in tort, and held that following Boys v. Chaplin the general rule should be departed from in the circumstances of the case, thereby permitting the plaintiff's action to proceed [191] (from which it follows that if the general rule had been applied the plaintiff would have failed in her action). This alternative approach was also adopted in Corcoran v. Corcoran,[192] it having been conceded by all parties that the issue was one in tort.[193]

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187 Warren v. Warren [1972] Qd. R. 386; Corcoran v. Corcoran [1974] V.R. 164. See Dicey and Morris, p. 959. Graveson, however, suggests that "English courts tend to make the question one of procedure": Conflict of Laws (7th ed., 1974), p. 594.

188 [1972] Qd. R. 386.

189 Law Reform (Husband and Wife) Act 1968 (Qld.), s.2.

190 Married Women's Property Act 1901-1964 (N.S.W.), s.16.

191 For a discussion of this aspect of Boys v. Chaplin see above, paras. 2.23 ff.

192 [1974] V.R. 164.

193 Ibid., 166. See also Schmidt v. Government Insurance Office of New South Wales [1973] 1 N.S.W.L.R. 59, where the issue was also treated as one in tort. Again, this case is unsatisfactory since it contains reasoning which is based on the second alternative analysis in Koop v. Bebb (1951) 84 C.L.R. 629, mentioned above at paras. 2.71 - 2.72.

9. Foreign Land

2.80 An English court will decline jurisdiction in any case involving the determination of title to foreign land.[194] Formerly this refusal to take jurisdiction extended also to cases of trespass to foreign land.[195] However, by section 30 of the Civil Jurisdiction and Judgments Act 1982, the jurisdiction of any court in England and Wales or in Northern Ireland to "entertain proceedings for trespass to, or any other tort affecting, immovable property" now extends to cases in which the property is situated outside that part of the United Kingdom, unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property. It is to be presumed that such actions will now be subject to the choice of law rules applicable to other types of foreign tort.

2.81 Section 30 of the Civil Jurisdiction and Judgments Act 1982 does not extend to Scotland, and the approach of the Scottish courts has been rather different. They have not excluded in principle the entertaining of actions, including actions of damages, in relation to immoveables abroad but, particularly in the context of actions to determine proprietary or possessory rights in immoveables, they have liberally admitted the plea of forum non conveniens.[196] There is no authority, however, on the choice of law rules applicable to claims for damage to immoveables abroad, and it is presumed that the double actionability rule would apply.

10. Contribution

2.82 The right to recover contribution is largely governed in England and Wales and in Northern Ireland by the Civil Liability

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194 British South Africa Co. v. Companhia de Moçambique [1893] A.C. 602; Hesperides Hotels Ltd. v. Muftizade [1979] A.C. 508. Cf. The Tolten [1946] P. 135.

195 Hesperides Hotels Ltd. v. Muftizade [1979] A.C. 508.

196 Anton, p. 125.

(Contribution) Act 1978, and in Scotland by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. There can be no doubt that the right to contribution is substantive and not merely procedural.

2.83 The Civil Liability (Contribution) Act 1978 contains no general choice of law rules and may be taken not to apply directly to all claims for contribution arising in a court in England and Wales or in Northern Ireland, but only to such of those claims as are governed by English or Northern Ireland law respectively.[197] There appears to be no English authority on the classification of a right to contribution for the purposes of private international law. There is, however, authority in purely domestic English cases to the effect that a right to contribution between tortfeasors is not in itself a right in tort, but is a right sui generis,[198] and there are dicta in Australian cases to the same effect.[199] A right to contribution could also arise by contract. It would therefore appear likely that the general rule in Phillips v. Eyre would not apply to a claim for contribution and that a different choice of law rule would be used to select the law applicable to the issue.[200]

2.84 In Scotland, however, it could be argued that section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 requires a Scottish court to apply the rules enunciated by that section as part of the

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197 The Law Commission made this point in its Working Paper (No. 75) on Classification of Limitation in Private International Law (1980), para. 76.

198 Harvey v. R.G. O'Dell Ltd. [1958] 2 Q.B. 78, 107-108; Ronex Properties Ltd. v. John Laing Construction Ltd. [1983] 1 Q.B. 398, 407. The point arose under the Law Reform (Married Women and Tortfeasors) Act 1935, s. 6(1)(c), which has now been repealed and replaced by the Civil Liability (Contribution) Act 1978.

199 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 127; Nominal Defendant v. Bagot's Executor and Trustee Co. Ltd. [1971] S.A.S.R. 346, 356, 365-366 (reversed in part on other grounds (1970) 125 C.L.R. 179); Stewart v. Honey (1972) 2 S.A.S.R. 585, 592. To the contrary is Baldry v. Jackson [1977] 1 N.S.W.L.R. 494, where the claim was classified as delictual.

200 See Dicey and Morris, pp. 967-968; Morse, p. 209.

lex fori to all claims for contribution coming before it, whether or not the claim is itself governed by Scots law.

11. Indemnity

2.85 There does not appear to be any English, Scottish, or Northern Ireland authority on the classification of a right to indemnity for the purposes of private international law. A right to indemnity may, for example, be contractual, quasi-contractual or sui generis, and cannot be regarded as intrinsically tortious or delictual. It would therefore appear likely that our present choice of law rule in tort or delict would not be applied to this issue, and that a claim for indemnity would therefore not be governed by the rule in Phillips v. Eyre or McElroy v. McAllister.[201]

12. Tort or delict and contract

2.86 In the uneasy relationship of tort or delict and contract in the conflict of laws there are two particular problems which may arise.

(a) Wrong is both a tort or delict and a breach of contract

2.87 The question here is whether the person wronged should frame his claim in the United Kingdom in contract or in tort or delict. It is, however, clear in England and Wales that the claimant may choose how to frame his claim, and the wrongdoer has no option but to defend on the ground chosen by the claimant.[202] It is thought that this remains so even where the lex loci delicti is that of a country, such as France, where the existence of a claim in contract means that no claim in tort or delict may

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201 See Nominal Defendant v. Bagot's Executor and Trustee Co. Ltd. [1971] S.A.S.R. 346, 365-368; Stewart v. Honey (1972) 2 S.A.S.R. 585, 592; Borg Warner (Australia) Ltd. v. Zupan [1982] V.R. 437, 442, 456.

202 See Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1153 (C.A.). This question may assume a particular practical importance if there is any question of serving a writ outside the jurisdiction under R.S.C., O.11.

be brought,[203] since the second limb of the rule in Phillips v. Eyre requires only that the wrong complained of should give rise to civil liability under the lex loci delicti, and contractual liability may well be sufficient.[204]

2.88 The same choice exists also for a person pursuing his claim in Scotland.[205] Although there does not appear to be any Scottish authority dealing with this question in the context of a claim in contract or delict arising out of a "foreign" wrong, it is reasonable to assume that the claimant would still have the option of which remedy to pursue.

(b) Contractual defence to a claim in tort or delict

2.89 The second question, upon which there is little clear authority, concerns the effect of a contractual defence to a claim in tort or delict, where the tort or delict is subject to the rule in Phillips v. Eyre or McElroy v. McAllister. This issue arose in England in Sayers v. International Drilling Co. N.V.[206] That case arose out of an accident which occurred during the course of the plaintiff's employment on an oil rig off the coast of Nigeria (but apparently within Nigerian territorial

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203 See Kahn-Freund, 130-134; H. & L. Mazeaud and Tunc, Responsabilité Civile, Vol. 1 (6th ed., 1965), paras. 173-207.

204 See above, para. 2.17. It is not established whether this civil liability is that provided for under the internal law of the locus delicti, or whether it is merely such civil liability as could be established in an action there: the former would seem more consistent with the general rejection of renvoi in tort and delict cases (see para. 2.18 above). The distinction would be relevant when the only civil liability was that provided for under a contract whose proper law was not that of the locus delicti.

205 Donoghue v. Stevenson 1932 S.C. (H.L.) 31, 64 per Lord Macmillan; Junior Books Ltd. v. Veitchi Co. Ltd. 1982 S.L.T. (H.L.) 492, 501 per Lord Roskill. See also Duke v. Jackson 1921 S.C. 362, where the pursuer's action of damages was founded on delict and on breach of contract.

206 [1971] 1 W.L.R. 1176 (C.A.).

waters). Following the accident, the plaintiff commenced proceedings in England against his employers, seeking from them damages for negligence.

2.90 The case did not proceed to a full consideration of all the issues involved, but went to the Court of Appeal for a determination of the proper law of the plaintiff's contract of employment, a clause in which would (if valid) have excluded liability on the part of the plaintiff's employers. The plaintiff sought to show that the proper law of the contract was English and that the exclusion clause was void.[207] His employers claimed that the proper law of the contract was Dutch, by which law the exclusion clause was valid.

2.91 In the Court of Appeal, Salmon and Stamp L.JJ. held that the proper law of the contract was Dutch, so that as a matter of contract law the exclusion clause was valid. In so holding, however, Salmon and Stamp L.JJ. made no comment on the inter-relationship of the claim in tort and the defence in contract.

2.92 Lord Denning M.R. based his decision upon different grounds. After stating his view that the law to be applied in considering a claim in tort was the proper law of the tort,[208] he identified two issues. His view was that the proper law of the tort (apart from the contract) was Dutch,

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207 By virtue of the Law Reform (Personal Injuries) Act 1948, s. 1(3); see para. 2.95 below. It is not clear whether the plaintiff's position was simply that s. 1(3) applied because the proper law of the contract was English, or whether he also claimed in the alternative that s. 1(3) applied as a mandatory provision of English law even if the proper law of the contract was not English. It seems that the Court of Appeal was not asked to consider the latter point. See the discussion of Brodin v. A/R Seljan 1973 S.L.T. 198 at paras. 2.94 - 2.96 below.

208 [1971] 1 W.L.R. 1176, 1180. This proposition is untenable as a matter of authority: Morse, p. 282.

whereas the proper law of the contract (apart from the tort) was English.[209] However, in his opinion -

> "it is obvious that we cannot apply two systems of law, one for the claim in tort, and the other for the defence in contract. We must apply one system of law by which to decide both claim and defence."[210]

He held that the appropriate system of law was that with which the issues had the closest connection, namely Dutch law, so that the exclusion clause was effective.

2.93 The rule in Phillips v. Eyre was not mentioned in Sayers, and we do not think that it is "obvious that we cannot apply two systems of law, one for the claim in tort, and the other for the defence in contract". Nevertheless, Sayers does seem to indicate that a contractual term which would be void in a contract whose proper law was English but which is valid according to its proper law may be effective as a defence to an action on a foreign tort.[211]

2.94 The only relevant reported case in Scotland, Brodin v. A/R Seljan,[212] deals with the relatively simple issue whether, when a delict has been committed in Scotland, the defender may rely upon a contractual defence alleged to be available to him under the foreign proper law of a contract between himself and the pursuer,[213] but which would not

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209 [1971] 1 W.L.R. 1176, 1181.

210 Ibid.

211 Subject to the Unfair Contract Terms Act 1977, s.27(2), the effect of which is that the parties to a contract may not necessarily succeed in avoiding the provisions of the Act by the device of applying foreign law to their contract.

212 1973 S.L.T. 198.

213 A foreign contract can provide a defence to an action based upon a tort committed in England: Galaxias Steamship Co. Ltd. v. Panagos Christofis (1948) 81 Ll. L.R. 499; Kahler v. Midland Bank Ltd. [1950] A.C. 24; Zivnostenska Banka v. Frankman [1950] A.C. 57. See also Scott v. American Airlines Inc. [1944] 3 D.L.R. 27.

have been available to the defender had the proper law of the contract been Scots law. This question has not been decided in England and Wales.

2.95 The original pursuer, a seaman, had been injured in an accident on board a ship while it was docking in a Scottish port, and alleged that the accident had been occasioned by the negligence of the defenders. He claimed damages in reparation for the injuries he sustained. The pursuer died after the case was first heard on the procedure roll, and his widow and executrix was sisted as pursuer in his place. The defenders averred that the deceased had entered into a contract of service with the defender of which the proper law was the law of Norway, that he had agreed that service on board the vessel should be governed by the rights and duties provided for by the law of Norway, and that under Norwegian law the deceased was entitled only to certain limited payments under national insurance legislation. The pursuer's reply was that the accident took place in Scotland and that section 1(3) of the Law Reform (Personal Injuries) Act 1948 applied.[214] This rendered void any provision in a contract of service in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused, to the person employed, by the negligence of persons in common employment with him.

2.96 Lord Kissen sustained the pursuer's claim on the ground that the alleged delict had been committed in Scotland and that there was nothing in section 1(3) to suggest that it was intended to apply only to delicts in Scotland arising out of contractual relations under a contract governed by Scots (or English) law. The contract, therefore, so far as it had the effect of excluding liability under section 1(3), was unenforceable.

2.97 The present state of the authorities is such that no view of the relationship between a contractual defence and the general rule in Phillips v. Eyre or McElroy v. McAllister can be confidently advanced as that

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214 This is the same provision as was in issue in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176: see paras. 2.89 - 2.93 above.

which a court in the United Kingdom will adopt.[215] The intricacy of the issues inherent in this relationship is not in doubt.[216] In principle, however, it would seem -

(a) that the validity and interpretation of a contractual term should be a matter for the proper law of the contract; but that

(b) under the rule in Phillips v. Eyre or McElroy v. McAllister the contractual defence (as so construed) should, if valid, then be tested according to both the lex fori and the lex loci delicti; and that the claimant's action would fail if the contractual term would be an effective defence under either the lex fori or the lex loci delicti.

2.98 Thus, for the purposes of the first limb of the rule in Phillips v. Eyre or McElroy v. McAllister, the validity and construction of the contractual term would be decided by the proper law of the contract, selected according to the principles of private international law of the lex fori (that is, English, Scottish, or Northern Ireland principles); and the effect as a defence of the term so construed would then be decided by the lex fori. If, for example, it was a rule of the lex fori that liability for the tort or delict in question could not be excluded by contract, then a contractual term which purported to do so would be of no effect notwithstanding that it was valid according to the proper law of the contract.

2.99 No consideration was given in Sayers v. International Drilling Co. N.V.[217] to the effect of the contractual term under the lex loci

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215 The question was discussed but not analysed in detail in Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. Since the contract in that case would not in any event have excluded liability there was no need to do so. See Morse, (1984) 33 I.C.L.Q. 449, 459.

216 For more detailed discussion, see Dicey and Morris, pp. 962-964; Kahn-Freund, pp. 141-145; Morse, pp. 187-194; Collins, "Interaction between contract and tort in the conflict of laws", (1967) 16 I.C.L.Q. 103; North, "Contract as a tort defence in the conflict of laws", (1977) 26 I.C.L.Q. 914, 920-927.

217 [1971] 1 W.L.R. 1176.

delicti. It would, however, appear inevitable that under the second limb of the rule in Phillips v. Eyre or McElroy v. McAllister this question would have to be examined in order to discover whether civil liability existed between claimant and wrongdoer under the lex loci delicti. What is not at all clear, however, is whether for this purpose a court in the United Kingdom would determine the validity and construction of the contractual term by its proper law, selected according to its own principles of private international law (and then test the contractual term so construed against the provisions of the lex loci delicti), or whether the court in the United Kingdom would instead determine the validity and construction of the contractual term according to the system of law selected by the principles of private international law in force under the lex loci delicti.[218]

2.100 An illustration may make this clear. Consider a tort or delict committed in Ruritania. The claimant brings an action against the wrongdoer in England. The wrongdoer's only defence is that by virtue of a contractual term he is exempted from liability. According to English principles of private international law, the proper law of the contract is Mercian. By Mercian law the contractual term is void. The wrongdoer therefore has no defence under the first limb of the rule in Phillips v. Eyre. However, the second limb of the rule in Phillips v. Eyre requires civil liability to exist under the law of Ruritania. Under Ruritanian rules of private international law the proper law of the contract is not Mercian law, but the law of Wessex, according to which the contractual term is valid. The contractual term would therefore constitute a good defence to

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218 This issue was not explored in Canadian Pacific Railway Co. v. Parent [1917] A.C. 195 (P.C.). In that case a widow brought an action in Quebec, seeking damages in respect of her late husband's death, which had occurred in Ontario following an accident there caused by the negligence of the railway company's employees. It was held that, owing to contractual conditions binding upon him, the deceased would have been precluded from bringing an action against the railway company himself. Under the law of Ontario this meant that the widow could not have maintained an action there either. The widow's action in Quebec therefore failed under the second limb of the rule in Phillips v. Eyre, even though the law of Quebec did not contain a similar restriction.

an action in Ruritania. Thus the result of the action in England will depend upon whether, for the purposes of the second limb of the rule in Phillips v. Eyre, the English court will determine the validity of the contractual term according to the law of Mercia or the law of Wessex.

2.101 It would seem, although there is no authority, that an analysis corresponding to that of the inter-relationship of tort or delict and contract (as outlined above) is also appropriate to the assignment or assignation of delictual claims. Thus it would be for the law governing the tort or delict to say whether or not the claim could be assigned: this question would therefore be submitted to the rule in Phillips v. Eyre or McElroy v. McAllister.[219] The law governing the assignment or assignation would however determine the validity and construction of the particular transaction.[220]

13. Third party rights against insurers

2.102 Our internal law on this subject is contained principally in the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act (Northern Ireland) 1930, which apply, in particular, when the insured goes bankrupt or, being a company, is wound up.[221] This legislation is silent on questions of private international law.

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219 Cf. Dicey and Morris, pp. 956-957, where it is suggested that the claim need be assignable only under the lex loci delicti.

220 Morse, pp. 147-148.

221 In the case of motor insurance, further relevant legislation is the Road Traffic Act 1972, ss. 149, 150 and the Road Traffic (Northern Ireland) Order 1981, articles 98, 100. In addition, the injured party may in certain circumstances be able to recover from the Motor Insurers' Bureau ("M.I.B."). Such recovery is not based upon statute but rather upon agreements between the appropriate Secretary of State and the M.I.B. The relevant agreements are: "Compensation of Victims of Untraced Drivers", agreements dated 22 November 1972 and 7 December 1977 (which apply to claims "arising out of the use of a motor vehicle on a road in Great Britain"); "Compensation of Victims of Uninsured Drivers", agreement dated 22 November 1972.

2.103 The question which arises in this context is whether or not a direct action against an insurer is governed by the rule in Phillips v. Eyre or McElroy v. McAllister: in other words, whether or not the appropriate choice of law rule is that in tort and delict. There appears to be no authority on the point in this country, and it is therefore not possible to say with certainty how a court in the United Kingdom would characterise the issue of whether the claimant could sue the insurer directly, but it seems that under the 1930 Acts the third party is subrogated to the rights of the insured, and that his right of direct action should therefore be regarded as contractual in nature.[222]

2.104 Relevant cases arising out of motor accidents have, however, arisen in Australia.[223] Two of these cases[224] treat the issue as one in tort, and therefore as subject to the general rule in Phillips v. Eyre. In the other cases, the rule in Phillips v. Eyre was not applied, and in so far as the courts offered observations on the proper classification of the action, it was described as quasi-contractual or as a right sui generis conferred by statute and acting as an extension of contractual obligations. In Plozza v. South Australian Insurance Co. Ltd.[225] and in Stewart v. Honey[226] the right of direct action which the court was

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222 See Macgillivray and Parkington on Insurance Law (7th ed., 1981), para. 1093.

223 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122; Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R 143; Hall v. National & General Insurance Co. Ltd. [1967] V.R. 355; Stewart v. Honey (1972) 2 S.A.S.R. 585; Hodge v. Club Motor Insurance Agency Pty. Ltd. (1974) 7 S.A.S.R. 86; Ryder v. Hartford Insurance Co. [1977] V.R. 257.

224 Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R. 143; Ryder v. Hartford Insurance Co. [1977] V.R. 257. In the latter case the tort had occurred in the country of the forum.

225 [1963] S.A.S.R. 122.

226 (1972) 2 S.A.S.R. 585.

prepared to apply happened also to be that provided for under the lex fori, which was held to extend to accidents which occurred outside the territory of the forum. However, it appears from those cases and also from Hall v. National and General Insurance Co. Ltd.[227] and Hodge v. Club Motor Insurance Agency Pty. Ltd.[228] that the appropriate right of direct action is not that of the lex fori as such, but that provided for by the legislation under which the relevant contract of insurance was issued. This legislation might be domestic or foreign. It should, of course, be borne in mind that the Australian decisions were reached in the context of a federal system and also on the basis of the particular legislation there under consideration.

2.105 Two Australian cases which treat the issue as governed by the law of the contract of insurance also indicate that preconditions of the insurer's liability provided for by that law must be complied with.[229] One such precondition may give rise to a further problem. It is likely that the law governing the direct action will provide that the liability of the insurer to the claimant shall in some way be contingent upon the prior establishment of liability of the insured to the claimant. What this means in any particular case will depend upon the law under consideration. However, where that law is foreign, and for the purposes of that foreign law it is necessary to use a choice of law rule in tort or delict to select a third law by which to determine the liability of the

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227 [1967] V.R. 355.

228 (1974) 7 S.A.S.R. 86.

229 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128-129; Hall v. National & General Insurance Co. Ltd. [1967] V.R. 355, 364. Any relevant precondition must presumably be substantive and not merely procedural, for if it is regarded as procedural only it will be ignored here: General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877, 152 E.R. 1061. See Cheshire and North, pp. 702-703; Dicey and Morris, p. 1192.

insured to the claimant,[230] the question arises whether the choice of law rule which a court in the United Kingdom would use will be the rule in Phillips v. Eyre or McElroy v. McAllister, or the rule which would be used by a court in the country of the direct action legislation in question. There is no authority on this point.[231] It would seem, however, that the question whether or not the insured would be liable in tort or delict in an action in the United Kingdom is in principle an issue separate from the question whether or not the insurer is liable to the third party in an action in the United Kingdom.

Torts and delicts at sea

A. TORTS AND DELICTS COMMITTED ON THE CONTINENTAL SHELF

2.106 By virtue of section 3(2) of the Continental Shelf Act 1964 (as extended by section 8 of the Mineral Workings (Offshore Installations) Act 1971)[232] and the Orders in Council made thereunder,[233] questions arising out of acts or omissions taking place in certain offshore areas in connection with the exploration of the sea bed or subsoil or the exploitation of their natural resources are to be determined according to "the law in force" in such part of the United Kingdom as is specified in the Orders. It is thought that one effect of these provisions is that an act or omission which takes place in a designated offshore area is to be treated for choice of law purposes as if it had occurred in the

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230 This may not be necessary under the legislation in question. It was, for example, stated in Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 127-128 (where the legislation applied was that of the country of the forum) that the insured had to be liable to the claimant according to the law of the place where the tort occurred but that it was not necessary that he should also be liable according to the lex fori, and the rule in Phillips v. Eyre was not invoked.

231 It is assumed in Dicey and Morris, pp. 960-961, that the choice of law rule of the forum would apply.

232 These provisions will be repealed, and replaced by s.23 of the Oil and Gas (Enterprise) Act 1982, when the relevant provisions of that Act are brought into force.

233 S.I. 1980 Nos. 184 and 559; S.I. 1982 No. 1523.

specified part of the United Kingdom, so that (for example) the English choice of law rule in tort would apply in an action in an English court arising out of an act or omission which had occurred in the Scottish or Northern Ireland offshore area.[234]

B. OTHER TORTS AND DELICTS COMMITTED ON THE HIGH SEAS[235]

1. Torts and delicts not confined to one ship[236]

2.107 A collision is, perhaps, the most obvious example of a tort or delict on the high seas which is not confined to one ship. Cases arising out of collisions on the high seas are in England decided according to "the general maritime law as administered in [England]",[237] which means, in

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234 Daintith and Willoughby (eds.), A Manual of United Kingdom Oil and Gas Law (1977), pp. 33, 56-57, 397-398.

235 The expression "high seas" is here used to mean that part of the sea which is not subject to the sovereignty of any state. This meaning is more confined than that sometimes attached to the expression, particularly in connection with the jurisdiction of the Admiralty Court, which extended to the territorial sea as well. See Halsbury's Laws of England, Vol. 1 (4th ed., 1973), paras. 301 ff.; and The Tolten [1946] P. 135, 156 ff.

236 It is for convenience that we refer only to ships. The same principles would apply to any other seagoing structure, such as an oil rig.

237 The Leon (1881) 6 P.D. 148, 151 per Sir Robert Phillimore. See The Zollverein (1856) Swab. 96, 166 E.R. 1038; The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co., Ltd. (1883) 10 Q.B.D. 521; Cheshire and North, pp. 291-292; Dicey and Morris, p. 974; Marsden, The Law of Collisions at Sea (British Shipping Laws, Vol. 4, 11th ed., 1961), paras. 249-250, and 261 et seq; Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115, 121-125. Regulations for preventing collisions have now been adopted by international agreement: Convention on the Revision of International Regulations for Preventing Collisions at Sea (1972) Cmnd. 5471. Effect has been given to these regulations in the United Kingdom by the Collision Regulations and Distress Signals Order 1977, S.I. 1977 No. 982 (as amended). These extend in certain circumstances to seaplanes and have been similarly applied in modified form to hovercraft (Hovercraft (Application of Enactments)(Amendment) Order 1977, S.I. 1977 No. 1257).

reality, the rules evolved by English courts for the determination of maritime questions,[238] and which was described by Willes J. in Lloyd v. Guibert[239] as "being in truth nothing more than English law".[240] The application of English law by the English courts in disputes concerning collisions is well settled, and it would further appear that the English courts apply English law to all torts on the high seas, whether or not the case is heard by a court exercising Admiralty jurisdiction and whether or not the principles of maritime law are invoked:[241] the exact scope of these principles does not appear to be entirely clear. The English law to be applied includes statutes which can as a matter of construction extend to the high seas, but not those which cannot be so construed.[242] It is not clear whether a distinction would be made between, on the one hand, a tort or delict which could only be said to have taken place on the high seas (such as a collision), and, on the other hand, a tort or delict which (while not confined to one ship) could be described as having taken place on board one of the ships rather than upon the high seas - for example, a defamatory statement communicated from one ship to another.

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238 See The Gaetano and Maria (1882) 7 P.D. 137, 143 per Brett L.J.; The Tojo Maru [1972] A.C. 242, 290-291 per Lord Diplock.

239 (1865) L.R. 1 Q.B. 115.

240 Ibid., 123.

241 E.g. The Sub-Marine Telegraph Co. v. Dickson (1864) 15 C.B. (N.S.) 759, 143 E.R. 983 (negligently allowing anchor to foul cable lying on sea-bed); The Tubantia [1924] P. 78 (trespass and wrongful interference with salvage services). See Cheshire and North, p. 292; Dicey and Morris, pp. 972-973; Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115, 121.

242 For example, in both Davidsson v. Hill [1901] 2 K.B. 606 and The Esso Malaysia [1975] Q.B. 198 the provisions of the Fatal Accidents Acts were held to apply to an action by a foreigner arising out of events which had occurred on the high seas. The editors of Dicey and Morris suggest (at p. 975, n. 77) that the Maritime Conventions Act 1911 would also apply as part of the general maritime law. By contrast, it was held in Cope v. Doherty (1858) 2 De G. & J. 614, 44 E.R. 1127 and in The Wild Ranger (1862) Lush. 553, 167 E.R. 249 that the limitation of liability provided for by the Merchant Shipping Act 1854, s. 504, did not extend to foreign ships on the high seas: see above, para. 2.58.

2.108 Despite the contrary decision in Kendrick v. Burnett,[243] the law of Scotland on these questions is believed to be to the same general effect. In other words, such cases fall to be regulated, according to the laws and customs of the sea, by the maritime law of Scotland. This has been held to be identical to that of England.[244] The history of the matter is discussed in Sheaf Steamship Co. Ltd. v. Compania Transmediterranea.[245]

2.109 Although it would be possible to maintain that the rule in Phillips v. Eyre or McElroy v. McAllister applies to torts and delicts on the high seas, and that the lex loci delicti for the purposes of the second limb of the rule is the maritime law,[246] the preferable view must surely be that the rule does not apply at all.[247] If this is so there is no question of the possible operation of the Boys v. Chaplin exception.

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243 (1875) 25 R. 82. See also the explanations of Lord President Dunedin in Convery v. Lanarkshire Tramways Co. (1905) 8 F. 117.

244 Currie v. McKnight's Executors (1896) 24 R. 1.

245 1930 S.C. 660.

246 See Graveson, Conflict of Laws (7th ed., 1974), p. 585. The judgment of Phillimore J. in Davidsson v. Hill [1901] 2 K.B. 606, 616 appears to assume that the double-barrelled general rule does apply, at least in relation to an action for damages for personal injury sustained as a result of a collision on the high seas, or an action under the Fatal Accidents Acts consequent upon such a collision. The same appears from Gronlund v. Hansen (1969) 4 D.L.R. (3d) 435, 443. In the latter case reliance was placed upon Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273. Even if Gronlund v. Hansen is properly classified as a tort occurring on the high seas and not confined to one ship, since it arose (at least partly) out of a collision, Watson was a tort involving only one ship, and the two cases would therefore seem to require the application of different sets of principles.

247 Cheshire and North, p. 291; The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co., Ltd. (1883) 10 Q.B.D. 521, 537, per Brett L.J.

2. Torts and delicts confined to one ship

2.110 In England, it seems likely that the general rule would apply in this situation.[248] If so, it would seem reasonable to suppose that the lex loci delicti would in all ordinary cases be the law of the ship's flag (or, if the flag does not identify a single system of law, that of the port of registry).[249] In Scotland, it is believed that as a general rule the requirement of double actionability would require to be fulfilled but there is no express authority to this effect.

C. TORTS AND DELICTS COMMITTED IN FOREIGN WATERS

1. Torts and delicts not confined to one ship

2.111 In England, the general rule in Phillips v. Eyre applies, and the law of the flag of the ship or ships is irrelevant; for the purposes of the second limb of the rule the lex loci delicti is that of the littoral state.[250] The most obvious example of such a tort is a collision, either between two ships or between a ship and a fixed structure. Similarly, it is believed that in Scotland the rule of double actionability would apply, the lex loci delicti being the law of the littoral state.

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248 Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273; Cheshire and North, p. 290; Dicey and Morris, p. 972; cf. Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115. An example of such a tort is provided by The Jalakrishna [1983] 2 Lloyd's Rep. 628, where, however, choice of the applicable law was not in issue.

249 Cf. Gronlund v. Hansen (1969) 4 D.L.R. (3d) 435, 443, where the lex loci delicti was held to be "the general maritime law of all civilized nations as it is administered in Canada". This does not appear to be consistent with the classification of this case as involving a tort confined to one ship, but (pace Dicey and Morris, p. 972, n. 56) it may be that it should not be so classified. See above, n. 246. Section 265 of the Merchant Shipping Act 1894, which provided a choice of law rule for certain purposes, and which was relied upon in Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273, was repealed by the Merchant Shipping Act 1970, s.100 and Schedule 5, and was not replaced.

250 The Halley (1868) L.R. 2 P.C. 193 (P.C.); The M. Moxham (1876) 1 P.D. 107 (C.A.); Carr v. Fracis Times & Co. [1902] A.C. 176; The Arum [1921] P. 12; The Waziristan [1953] 1 W.L.R. 1446.

2. Torts and delicts confined to one ship

2.112 It would seem that the general rule in Phillips v. Eyre would apply in this situation also, although there appears to be no English authority.[251] Whether an English court would consider the lex loci delicti to be the law of the ship's flag or the law of the state in whose waters the ship was situated when the tort occurred remains undecided. The latter, however unattractive, would appear to be more consistent with the general rule,[252] and the question was decided in this sense in Scotland in the case of MacKinnon v. Iberia Shipping Co. Ltd.,[253] which is examined in paragraph 2.45 above.

Torts and delicts in flight[254]

2.113 There appears to be no relevant authority. The questions which arise in this context are similar to those which arise in connection with ships, although the legal treatment accorded to aircraft is not entirely analogous to that accorded to ships.[255] In particular, it appears that the concept of the "law of the flag" has not been developed to the same extent in relation to aircraft as it has in relation to ships. In consequence it may therefore be that in the case of a tort or delict confined to one aircraft over the high seas, the applicable law will be the lex fori and that the law of the state of registration of the aircraft

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251 The point was not raised in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176 (C.A.): see above, paras. 2.89 - 2.93. This case concerned an accident on an oil-rig.

252 See Yorke v. British & Continental Steamship Co. Ltd. (1945) 78 Ll. L.R. 181, 184, per du Parcq L.J.

253 1955 S.C. 20.

254 See generally, Graveson, Conflict of Laws (7th ed., 1974), pp. 585-589; McNair, The Law of the Air (3rd ed., 1964), pp. 281-295; Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), paras. I(93)-(98).

255 McNair, The Law of the Air (3rd ed., 1964), pp. 260 ff.

would be irrelevant.[256] In all other cases a rule corresponding to that applying to ships may exist, the lex loci delicti, where relevant, being that of the subjacent territory.[257]

2.114 Some of the issues which may arise in this field involve also a contract of carriage and are the subject of uniform rules arrived at by international agreement,[258] which means that, in a case to which the rules apply, the choice of law rule in tort and delict will not in practice be invoked, and probably cannot in any event apply.[259]

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256 Ibid., 288; but with one exception the shipping cases cited in support of this proposition do not concern torts which were confined to one ship.

257 Ibid., 282; and for collisions see pp. 288-295. Cf. Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. I(97).

258 The Carriage by Air Act 1961, s.1 and Schedule 1, gives effect to the Warsaw Convention as amended at The Hague (1955). That Convention has subsequently been further amended, and Schedule 1 to the Carriage by Air Act 1961 will in consequence be replaced by Schedule 1 to the Carriage by Air and Road Act 1979 when s.1 of that Act is brought into force. The Carriage by Air (Supplementary Provisions) Act 1962 gives effect to the Guadalajara Convention (1961). These conventions apply only to certain "international carriage", but have been extended in modified form to almost all other carriage by air: Carriage by Air Acts (Application of Provisions) Order 1967 (S.I. 1967 No. 480) as amended. It has been suggested that this Order will always be applied in an action in the United Kingdom notwithstanding the existence of a foreign element: Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. VII (73)-(74).

259 Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. VII (71); McGilchrist, "Does the Warsaw Convention govern non-contractual liability?" [1983] L.M.C.L.Q. 685. See, for example, Goldman v. Thai Airways International Ltd. [1983] 1 W.L.R 1186 (plaintiff injured on board a Thai aircraft 80 miles north-west of Istanbul).

PART III

THE CASE FOR REFORM

A. THE PRESENT LAW IS ANOMALOUS

3.1 The present law gives a very prominent role to the lex fori through the double actionability rules in Phillips v. Eyre[260] and in McElroy v. McAllister.[261] The prominence of the role of the lex fori, in so far as it has received express justification, appears to be based on the idea that as a matter of principle an action in the United Kingdom on a foreign tort or delict should fail if it is not in accordance with the domestic law of the forum. This idea was expressed by Lord Justice-Clerk Thomson in McElroy v. McAllister as follows -

> "so far as actionability is concerned, it would be too much to expect the Court of the forum to entertain an action for what is not a wrong by the law of the forum. The Court of the forum must in fundamentals be true to its own law";[262]

and in the same case Lord President Cooper said that -

> "if a pursuer chooses to sue not in the primary Court [i.e. in the country where the delict was committed] but in some other Court of his own selection, he has only himself to thank if he finds himself encumbered by difficulties which ... prove insuperable."[263]

3.2 Similarly, in The Halley Selwyn L.J. said -

> "it is ... alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."[264]

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260 (1870) L.R. 6 Q.B. 1.

261 1949 S.C. 110.

262 Ibid., 117.

263 Ibid., 139.

264 (1868) L.R. 2 P.C. 193, 204.

3.3 It may be doubted whether the Privy Council in The Halley really "... intended to lay down a general rule to the effect that no action for a tort could succeed in England unless it was well founded according to English domestic law".[265] Nevertheless, a role of such prominence for the lex fori may have been understandable in view of the earlier history of actions on foreign torts and delicts,[266] and given also that the law of tort and delict was formerly seen much more than it is today as having a punitive, deterrent or "admonitory" function, and thus as closely allied to the criminal law (where there is, of course, no question of applying a foreign law in a prosecution in the United Kingdom).[267] However, the law of tort and delict is no longer seen in the same light. It is today seen much more as compensatory, or as concerned with restoring an equilibrium of private rights:

> "...under modern conditions, the law of tort, like the law of contract, serves the purpose of adjusting economic and other interests, ... it is increasingly an instrument of distributive rather than of retributive justice, and ... for this reason the argument in favour of the lex fori derived from the connection between the law of tort and the law of crime carries little conviction today."[268]

In our view the prominence of the lex fori therefore now requires to be re-examined.

3.4 The application of the lex fori as a matter of principle to foreign torts and delicts, and its prominence under our present law, are the subjects of widespread academic criticism;[269] and, although the role

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265 Dicey and Morris, p. 937.

266 See above, paras. 2.8 - 2.9, 2.38.

267 The reasons for the role played by the lex fori are surveyed by Kahn-Freund at pp. 20 ff.

268 Dicey and Morris, p. 931.

269 For example: Anton, p. 239; Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 615-616; Cheshire and North, pp. 266-268; Dicey and Morris, pp. 931, 937-938; Graveson, Conflict of Laws (7th ed., 1974), p. 570; Hancock, Torts in the Conflict of Laws (1942), pp. 86-89 and (1968) 46 Can. Bar Rev. 226; Kahn-Freund, pp. 34-35; Morse, pp. 50-55 and passim; Sykes and Pryles, Australian Private International Law (1979), p. 332.

of the lex fori in the present English rule was confirmed in Boys v. Chaplin, Lord Wilberforce there said of the first limb of the rule in Phillips v. Eyre that -

> "[i]t may be admitted that it bears a parochial appearance: that it rests on no secure doctrinal principle: that outside the world of the English-speaking common law it is hardly to be found."[270]

In almost every other area of the civil law[271] a court in the United Kingdom is prepared to apply a foreign law in an appropriate case (unless, of course, it would be contrary to public policy to do so); and everywhere else in our private international law, except in matters of procedure, if our choice of law rule selects a foreign law to determine a question, that foreign law applies exclusively and not concurrently with the lex fori.

3.5 One argument in favour of a heavy emphasis on the lex fori is that an English, Scottish or Northern Ireland court is thereby able to "give judgment according to its own ideas of justice".[272] We do not believe this argument to be as strong as might at first appear. In the first place, we do not see why this argument should prevail in the field of tort and delict but not in other fields. In the second place, and more importantly, we believe that such an assertion begs the question. A distinction must in our view be drawn between justice at the substantive level and justice at the choice of law level.[273] In other words, while we must assume that our domestic law represents our own ideas of justice

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270 [1971] A.C. 356, 387. We understand that countries in which a rule analogous to Phillips v. Eyre or McElroy v. McAllister applies, or has applied, include Egypt, Hungary, Japan, Syria, Thailand and the Soviet Union. The Hungarian provisions are set out in the Appendix to this paper.

271 The field of divorce provides an exception.

272 Boys v. Chaplin [1971] A.C. 356, 400, per Lord Pearson.

273 See Kegel, "The crisis of conflict of laws", [1964] II Hague Rec. 91, 185; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98; and also Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368.

between the parties in a case involving no foreign element, the introduction of a foreign element changes the picture; and as is recognised in other areas of our private international law, it may be that the foreign elements in a case make it entirely just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be very different from those of the lex fori. As Jaffey has put it -

> "Justice at the substantive level is to be found in domestic tort rules, but if one or more of the parties is foreign, and relevant events occurred abroad, justice between the parties at the choice of law level may require that the substantive standards of justice of another country's law should be applied by the English court."[274]

Although opinions may differ about the particular foreign elements which should be taken into account and the weight to be attached to them, it is difficult to justify being "... so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home".[275]

3.6 Both the rule in Phillips v. Eyre and that in McElroy v. McAllister require a reference to the lex loci delicti, and it is therefore clear that neither in England and Wales nor in Scotland has it been accepted that "our own ideas of justice" require the unadulterated application of the lex fori. Apart from matters of procedure, and subject to overriding public policy considerations, we do not believe that there is today any reason of principle why the lex fori should be applied automatically and in every case, without regard to the circumstances. Although it might, of course, be right in a particular case to apply the lex fori, its automatic role in our present law seems to us to be rigid and unnecessary, especially since the forum may well have no relevant connection at all with the dispute, being dictated only by the presence there of the wrongdoer or of his assets.[276]

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274 Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 102.

275 Loucks v. Standard Oil Co. of New York 120 N.E. 198 (1918), per Cardozo J. at p. 201.

276 Cf. the view of Lord President Cooper quoted in para. 3.1 above.

3.7 Apart from the argument based on justice which we have just considered and which Lord Pearson used in Boys v. Chaplin,[277] judicial support for the present law appears to be based more on the difficulty of finding an acceptable alternative rule[278] than upon a principled defence of the first limb of the general rule.

B. THE PRESENT LAW LEADS TO INJUSTICE

3.8 The injustice of the present law stems mainly from its requirement of double actionability. This requirement follows from the fact that the interests of justice clearly require that in our present rule the role given to the lex fori should be confined. For example, where the wrongdoer's conduct and its reaction upon the claimant would give rise to no cause of action at all in the place where the train of events occurred, it would be wrong to permit the wrongdoer to be subjected to liability under our own domestic law for no reason other than that the claimant chose to bring his action in the United Kingdom. Thus in Scotland, an action arising out of a foreign delict is based upon the lex loci delicti, whose application is tempered by the superimposition of the lex fori.[279] In England and Wales and in Northern Ireland the position is the converse: the lex loci delicti tempers the application of the lex fori.[280] The results of these two rules are in practice usually the same. As is widely conceded, however, the result of these (or indeed any similar) double actionability rules is another injustice: they are considerably to the advantage of the wrongdoer. The claimant cannot succeed in any claim unless both the lex fori and the lex loci delicti make provision for it; but the wrongdoer can take advantage of any defence available under the lex fori, and also of any substantive defence that is available under the lex loci delicti. An example of such injustice is provided by the Scots case of McElroy v. McAllister itself, which was described by Lord Keith in his

277 [1971] A.C. 356, 400.

278 See below, para. 3.17.

279 See paras. 2.38 - 2.40 above.

280 See paras. 2.8 ff. above.

judgment as "a typical case where insistence on the double rule enunciated by Willes, J., may work injustice".[281] In Boys v. Chaplin Lord Pearson said of the general rule as it is now understood that it -

> "... involves a duplication of causes of action and is likely to place an unfair burden on the plaintiff in some cases. He has the worst of both laws."[282]

3.9 As Lord Pearson further pointed out in Boys v. Chaplin,[283] the existence of a double actionability rule makes it hard to see that a court in this country is at present able to "give judgment according to its own ideas of justice".[284] Under such a rule the claimant can never succeed to a greater extent than is provided for by the less generous of the two systems of law concerned; and, depending on the particular divergences between those two systems, he may not succeed even to that extent. It is therefore not necessarily the case that the result produced by a double actionability rule corresponds with the standards of justice of either of the two systems of law concerned, except where those two systems themselves give virtually identical results; and in the case where the two systems of law do give virtually identical results, there seems little point in deciding the case or the issue by reference to more than one of those systems.

3.10 It might be argued that, in England and Wales, the Boys v. Chaplin exception will eliminate any injustice caused by the general double actionability rule, since in that case the lex fori alone was applied and the provisions of the lex loci delicti avoided. However, the existence in England and Wales since Boys v. Chaplin of a potential exception to the general rule does not, in our view, remedy the flaws in the general rule itself. Further, the exception is in any event unsatisfactory, for the reasons mentioned in the next following paragraphs.

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281 1949 S.C. 110, 132. The case is discussed above at paras. 2.39 - 2.41.

282 [1971] A.C. 356, 405.

283 Ibid.

284 Ibid., 400.

C. THE PRESENT LAW IS UNCERTAIN

3.11 The uncertainty of the present law consists mainly in the doubt surrounding Boys v. Chaplin: the extent to which exceptions may be made to the general double actionability rule is not clear. By contrast, the effects of the general rule are by now fairly clear in principle. Even so, it will be apparent from paragraphs 2.53 - 2.105 above that the operation of the general rule as applied to a number of issues in tort or delict remains a matter for speculation, owing to the lack of authority. While this state of affairs is unsatisfactory, the problems which it may cause should not be over-estimated, since it would probably be fairly clear in most cases what the result of applying the general rule should logically be; although it is true that some of the areas of doubt are of considerable potential importance, such as the relationship between our choice of law rule in tort and delict and contractual exemption clauses,[285] and the rights of third parties against insurers.[286]

3.12 However, the Boys v. Chaplin exception is another matter. As far as the law of Scotland is concerned, the principal uncertainty is whether, and (if so) to what extent, the courts in Scotland will adopt the Boys v. Chaplin exception. In England and Wales and in Northern Ireland, the uncertainty arises from the case itself. The exception is almost wholly undefined and the manner of its application in future cases is a matter for speculation. We have explored the doubts raised by the case in Part II;[287] they may be summarised as follows -

(a) It is not clear how far the exception goes. Clearly it can result in the application of the lex fori alone instead of the concurrent application of both the lex fori and the lex loci delicti. Whether it could in appropriate circumstances result in the application of the lex loci delicti alone, or in the application of some third law alone, is a matter of conjecture.

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285 See paras. 2.89 - 2.100 above.

286 See paras. 2.102 - 2.105 above.

287 Paras 2.23 - 2.36, 2.46.

(b) It is not clear what circumstances will justify the use of the exception. However, it does seem that the mere fact that the claimant's rights are doubly restricted under the general rule will not be sufficient to bring the exception into play. Emphasis was laid in Boys v. Chaplin itself on the fact that the parties were English and simply happened to be in Malta at the time of the accident: the parties had little connection with Malta, and the disapplication of Maltese law would not undermine the policy of the Maltese law. However, it is not possible to predict with confidence what factors might be thought relevant in a future case, or what weight would be attached to them.

3.13 In our view, the uncertainty surrounding the Boys v. Chaplin exception is unsatisfactory. Fears were expressed in Boys v. Chaplin that uncertainty would result from the adoption of the concept of the "proper law of the tort" as a choice of law rule.[288] The exception to the general rule which was created in Boys v. Chaplin appears to have resulted in a degree of uncertainty which is no less unsatisfactory. This uncertainty can only work to the detriment of the public, by complicating the task of professional advisers, by casting doubts on insurance claims and by increasing the hazards of litigation. It is hard to say whether the tendency to litigate has been increased or reduced, but it appears likely that litigation, once embarked upon, will be more prolonged and more expensive.

D. FORUM SHOPPING

3.14 A claimant is said to be "forum shopping" when he is able to bring his action in any of two or more countries, and he chooses the one where he believes the outcome will be most favourable to him. This

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288 [1971] A.C. 356, 381 per Lord Guest, 383 per Lord Donovan, 405 per Lord Pearson. We discuss the proper law of the tort in Part IV below.

practice receives much condemnation,[289] and a choice of law rule which might encourage it may come in for criticism on that account. It might therefore be said that one advantage of the present double actionability rule is that it discourages forum shopping to a greater extent than the application of a single law would, for the claimant has to surmount two hurdles rather than one hurdle only. To this extent a claimant may be discouraged from bringing an action in the United Kingdom.[290] However, even if this is true, it only reduces the number of claimants who are shopping for a forum in this country; it does not necessarily mean that forum shopping is reduced as a global activity, since the potential claimant may be encouraged by our choice of law rule to shop elsewhere for his forum.

3.15 We have no evidence of the extent to which forum shopping actually occurs,[291] and we are therefore not able to express a view about how far it is realistically necessary or desirable to go in order to discourage this practice. However, we do not believe that arguments based on forum shopping are more or less important in the context of tort and delict than in any other context; and, in any event, the choice of a forum may be influenced by a large number of factors, of which the relevant choice of law rule is only one. It is possible to curb forum shopping by means of the rules relating to jurisdiction or of the doctrine of forum non conveniens, but apart from this, and in the absence of uniform rules of substantive law, the incidence of forum shopping will be reduced if the choice of law rules of different countries are similar or the same. To the extent that a desire to discourage forum shopping should be allowed to influence our choice of law rules, this is an argument in favour of a reformed choice of law rule which bears a closer resemblance than our existing one does to the rules of foreign countries.

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289 For example, see Boys v. Chaplin [1971] A.C. 356, 378, 380 per Lord Hodson, 383 per Lord Donovan, 389 per Lord Wilberforce, 401, 406 per Lord Pearson.

290 Cf. Dicey and Morris, p. 937.

291 See Morse, pp. 57-58.

3.16 It should be mentioned in this context that the Civil Jurisdiction and Judgments Act 1982 contains provisions which are relevant to actions in tort and delict.[292] When the relevant provisions of that Act are in force it is possible that courts in the United Kingdom will be faced more often than hitherto with actions arising out of foreign torts or delicts.

E. CONCLUSION: CAN NO BETTER RULE BE FOUND?

3.17 In our view the present law cannot be justified on grounds of principle and is anomalous, uncertain, and can result in injustice. However, although it appears to have little extra-judicial support, there also appears to be some judicial acceptance of the present law on the practical ground that no better rule can be found. For example, in Boys v. Chaplin, Lord Hodson, Lord Wilberforce and Lord Pearson were opposed to applying the lex loci delicti, on the ground that the locus delicti might well be fortuitous;[293] and Lord Guest, Lord Donovan and Lord Pearson were opposed to the adoption of the "proper law of the tort" on the ground that it would give rise to greater uncertainty.[294] Such judicial acceptance of the present law is, however, not universal - for example, Lord Denning has been an advocate of the "proper law of the tort".[295]

3.18 Our provisional view is that, for the reasons above stated, the present law is defective and should be reformed, and comments are invited on this view. The remainder of this consultation paper is concerned with the question of what should replace the present law.

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292 In particular, Schedule 1, articles 5(3), 6; Schedule 4, articles 5(3), 6.

293 [1971] A.C. 356, 380, 388 and 405 respectively.

294 Ibid., 381, 383 and 405 respectively.

295 Boys v. Chaplin [1968] 2 Q.B. 1, 19-26 (C.A.); Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176.

PART IV

THE OPTIONS FOR REFORM

A. INTRODUCTION

4.1 In this Part we describe in broad terms a number of basic rules or approaches which might form the foundation of a choice of law rule in tort and delict more appropriate than the one we now have. Although each option for reform has its own advantages and disadvantages, there are also certain general considerations which we have borne in mind throughout, and we therefore mention these before discussing the individual options. The options themselves fall into four groups. We discuss first two possible rules based on the application of the lex fori. We then consider three approaches which have in recent years been very influential in the United States. Thirdly we discuss options based on the application of the lex loci delicti. Finally we consider the concept of the "proper law of the tort" together with its United States manifestation in the form of the Restatement Second. Of these options our provisional conclusion is that two are acceptable as models for the reform of our own choice of law rule. One is an option whereby the lex loci delicti would apply unless another country had a closer and more real connection with the occurrence and the parties, in which case (subject to certain conditions) the law of that other country would apply. The other option would always apply the "proper law" of the tort or delict (that is, the law of the country with which the occurrence and the parties had the closest and most real connection), but certain presumptions as to the proper law would be provided in a number of cases. These two options are summarised at paragraph 4.144 below.

4.2 In view of the defects which we believe to exist in the present law, we have formed the view that our reformed system of choice of law rules in tort and delict should, in principle, not leave the present choice of law rules continuing to apply in any area, and we have therefore kept in mind throughout that our reformed choice of law rule is intended to have as wide a field of application as possible. However, in considering the available options, we have not found it practicable in this Part to examine

all the various types of tort and delict. Although the discussion of the options in this Part is not intended to be confined strictly to the "basic" wrongs of personal injury, death, and damage to property, we have however considered each option with such torts and delicts primarily in mind. Other types of tort and delict are then considered in Part V, against the background of our conclusions from this Part.

B. GENERAL CONSIDERATIONS

1. Matters which would be unaffected by our proposals

4.3 It should be recalled throughout what follows that none of our proposals is intended to make any change in the following areas.

(a) Procedure

4.4 Some matters are classified for the purposes of private international law as "procedural", as opposed to "substantive". The distinction between procedure and substance is dealt with in the standard works on private international law.[296] The lex fori applies in any event to matters classed as procedural, while matters classed as substantive are governed by the system of law selected by our choice of law rule. We propose no change in this principle or in the classification of any particular matter. Thus (for example) the measure of damages (as opposed to the heads of damage), rules of evidence, methods of enforcement, and generally the mode of trial and the machinery of justice in the United Kingdom, all of which are procedural, would be unaffected by our proposals.

(b) Mandatory rules

4.5 Certain rules of our own domestic law, although not procedural, are regarded as so important that as a matter of construction

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296 For example, Anton, ch. 25; Cheshire and North, ch. XX; Dicey and Morris, ch. 35.

or policy they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by a choice of law rule. In tort and delict cases, owing to the universal application of the lex fori through the rules in Phillips v. Eyre and McElroy v. McAllister, it has largely been unnecessary to decide which of our rules of law are of mandatory application. Although this question may arise more frequently under a reformed choice of law rule, our proposals for reform are not intended to alter the principles involved or to affect the classification of any of our rules of law as mandatory or not.

(c) Public policy

4.6 It is always open to a court in the United Kingdom to refuse, in exceptional cases, to apply a foreign law on the ground of public policy: "an English court will refuse to apply a law which outrages its sense of justice or decency".[297] This discretion is, however, to be exercised sparingly:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[298]

Our proposals would not affect any of these principles, which we intend should remain unchanged notwithstanding reform of our choice of law rules.

(d) Special choice of law rules

4.7 Except where otherwise stated, our proposals are intended to do no more than replace our existing choice of law rules in tort and delict, and are not intended to cover a wider or narrower field. Except where we

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297 In the estate of Fuld (No. 3) [1968] P. 675, 698 per Scarman J.

298 Loucks v. Standard Oil Co. of New York 120 N.E. 198, 202 (1918), per Cardozo J; cited with approval in Cheshire and North, p. 146, and Dicey and Morris, p. 83.

expressly say otherwise, our proposals would therefore apply in all the areas where our existing choice of law rule applies, but not in any area to which our existing choice of law rule does not extend. Further, our proposals are not intended to supersede or alter any special rules which may exist in particular fields, or preclude the adoption of further special rules in the future. Our proposals are therefore not intended to affect any rules adopted pursuant to any international convention.

(e) Jurisdiction

4.8 Our proposals are not intended to affect the jurisdiction of courts in the United Kingdom.

2. The expectations of the parties

4.9 The relevance of the expectations of the parties in tort or delict cases is a matter of some uncertainty. In the case of a contract, for example, it is clearly of the utmost importance that the parties should be aware in advance of the obligations they are undertaking. In the sphere of tort and delict the question does not appear to us to be so clear-cut.

4.10 As far as the expectations of a potential wrongdoer are concerned, it is argued that it is important to be able to predict, before undertaking an activity, what law would determine liability in tort or delict, if a tort or delict were to occur. As Kahn-Freund has said -

> "Those engaging in activities which may involve liability should be able to calculate the risk they are incurring. They should be able to feel safe in Rome if they do these as the Romans do",[299]

or, in other words -

> "when in Rome see that your insurance policy covers the risks against which Romans insure".[300]

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299 Kahn-Freund, p. 43.

300 Ibid., 44.

4.11 This argument seems to us to require some qualification. It is, of course, relevant in the case of potential wrongdoers who are alive to the possibility of liability in respect of their future activities, and who may wish to take advice about the extent of that liability. However, such a potential wrongdoer is likely to have most in mind the possibility of being sued in the country where his activities are being carried on. In such a case our rules of private international law are of no relevance. Where a potential wrongdoer is conscious of the potential impact upon his activities of our rules of private international law, the question is, therefore, how important it is that a court in the United Kingdom should apply the same law as would be applied in an action in the country where the activity is being carried on. Although there may be other reasons for doing this, protection of the expectations of the potential wrongdoer is not one of them, for (as Kahn-Freund has said) "...expectations depend on what the lawyers will tell their clients about the decisions of the courts...".[301] In many cases it would indeed seem to be doubtful whether the potential wrongdoer could be said to have any relevant expectations at all. In the words of the United States Restatement Second -

> "... the protection of the justified expectations of the parties ... is of lesser importance in the field of torts. This is because persons who cause injury..., particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question."[302]

4.12 It has been argued, however, that it is necessary for insurers to be able to predict the law by which their insured might be held liable in

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301 Ibid., 153-154.

302 Restatement Second, s.145, comment b, pp. 415-416. The description of expectations as "justified" seems, however, to beg the question. See also Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 894-895, and The Conflict of Laws (3rd ed., 1984), p. 305; Shapira, (1977) 77 Col. L.R. 248.

respect of his activities. This is said to be necessary to enable the insurer to assess the level of risk and to calculate the premiums accordingly. Our present understanding is that this argument is misconceived: although foreseeability of risk does play a part in the calculation of premiums, we understand that its role is generally rather small, and that premiums are based more on an analysis of past liability than on an assessment of future risk.[303] Further, we understand that the level of premiums is not in practice affected by our own rules of private international law, but, rather, reflects the level of damages generally awarded in the courts of the place where the activity is being carried on. Where an action is brought in a court in the United Kingdom, the assessment of damages is of course a matter of procedure and will be governed by the lex fori, not the system of law selected by our choice of law rule; and we propose no change in this principle.[304]

4.13 The expectations of the parties are, however, relevant in a different way after the tort or delict has occurred. Here the concern of the parties is not to predict the law according to which they must regulate their conduct, but rather that the choice of law should be, and be seen to be, reasonably appropriate in the circumstances. It is necessary that our choice of law rules should not be capricious in their operation.[305]

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303 C.R. Morris, "Enterprise liability and the actuarial process - the insignificance of foresight", (1961) 70 Yale L.J. 554; Hanotiau, "The American Conflicts Revolution and European Tort Choice-of-Law Thinking", (1982) 30 Am. J. Comp. L. 73, 76-78.

304 We are grateful to the British Insurance Association for their assistance on these matters.

305 See Anton, p. 40: "... even if every judge were perfectly impartial as between persons from his own country and persons from others, it would still be a valid objection that without established rules any decision which rejected the pleas of a stranger would be liable to be construed as a biased one. Justice might well be done, but would the unsuccessful foreign litigant think so?"

3. The need for certainty in the law, and the tension between certainty and refinement

(a) The need for certainty

4.14 After a tort or delict has occurred, it is a consideration of the first importance that the law should be certain, in the sense that the rules should be clearly formulated and their results easily predictable. It is clearly desirable that the parties to a dispute should be able to ascertain their rights and liabilities as easily as possible, and preferably without resorting to litigation. Where the subject matter of the dispute is a foreign tort or delict, this consideration would therefore support a choice of law rule which, at least after the event, pointed as unambiguously as possible towards the law by which the dispute between the parties was to be decided. A clear and simple choice of law rule would make it easier for insurance companies to deal with claims; and would quite probably promote settlements, since settlement might be difficult if the parties' advisers could not predict the course of litigation, and prediction would be difficult if the applicable law could not be foretold.

4.15 There are also procedural reasons why certainty is desirable. In the first place, a party who wishes to rely upon foreign law in our courts must prove it as a fact; but, if choice of law rules whose effect was uncertain applied, the parties might have to ascertain the content of more than one system of law in order to be ready for more than one outcome of the choice of law process. The applicable law could, no doubt, be determined as a preliminary issue, but we believe that it would be preferable to avoid this where possible. Secondly, where time limits are regarded as matters of substance, an uncertain choice of law rule could be a trap for the parties and their legal advisers: it would not be possible to tell in advance which limitation period applied. Thirdly, it might not be clear until the choice of law issue was resolved who were the appropriate parties to the action.

(b) The tension between certainty and refinement

4.16 To achieve maximum certainty, a choice of law rule must be based on a clear and simple connecting factor, with as few exceptions as possible. Such rules have a high degree of rigidity, in that they cannot be adapted to suit all the varied circumstances in which tort and delict cases arise. However, the objective of any choice of law rule is ideally to select the law which in all the circumstances it would be most appropriate to apply, and cases may arise where the law selected on the basis of a simple connecting factor is that of a country which has in reality very little connection with the actual occurrence:

> "No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems."[306]

4.17 A certain but crude choice of law rule which is not sufficiently subtle to cater adequately for the circumstances of particular cases may result in the application of what is clearly not the most appropriate law. This becomes important where the result of applying that law to the dispute differs from the result which would be obtained by applying another apparently relevant system of law, although it matters little where the results would be similar. It would be idle to suppose that a court is never influenced in its choice of law by its perception of the results which will follow from its decision. Experience both here and abroad (but particularly in the United States) has shown that a choice of law rule of great simplicity may produce results which "begin to offend our common sense",[307] and the courts may therefore seek to escape from them, for example by applying to a particular issue a different classification, and hence also a different choice of law rule.[308] Thus an

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306 Boys v. Chaplin [1971] A.C. 356, 391, per Lord Wilberforce.

307 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885, and The Conflict of Laws (3rd ed., 1984), p. 304.

308 We have discussed the classification of a number of issues at paras. 2.49 ff. above, and we return to them in Part VI below.

issue between the parties might be classified, not as an issue in tort or delict, but as an issue in family law,[309] or contract,[310] or as procedural;[311] or, ultimately, the doctrine of public policy may be invoked:[312] in all such cases, the choice of law rule in tort and delict would be avoided. The technique of classification is, of course, perfectly legitimate in principle, but it becomes particularly unsatisfactory where the new classification is artificial. Indeed, many issues in a tort or delict case have a dual nature (being connected, say, with both tort or delict and with family relations), and cannot rigidly be classified into one category or another. Further, the "classificatory approach to tort problems"[313] suffers from the fact that -

> "[i]t is conceptually so crude and indiscriminating that, while indicating a satisfactory solution for one case, it compels the court to approve an unwelcome result in another."[314]

4.18 While it is important that our reformed choice of law rule should possess a high degree of certainty, it is also important that it should be sufficiently refined to be capable of selecting an appropriate system of law in as high a proportion of cases as possible, so that the

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309 For example, as to whether one spouse could sue the other in tort, see Haumschild v. Continental Casualty Co. 95 N.W. 2d 814 (1959) (now superseded: Zelinger v. State Sand and Gravel Co. 38 Wis. 2d 98, 156 N.W. 2d 466 (1968)); Warren v. Warren [1972] Qd. R. 386 (as one of two alternative grounds).

310 For example, Levy v. Daniels' U-Drive Auto Renting Co., Inc. 143 A. 163 (1928).

311 For example, Boys v. Chaplin [1971] A.C. 356, 381-382 per Lord Guest, 383 per Lord Donovan; Grant v. McAuliffe 264 P. 2d 944 (1953); Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961), [1961] 2 Lloyd's Rep. 406.

312 For example, Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961), [1961] 2 Lloyd's Rep. 406 .

313 As Morse describes it: p. 221.

314 Hancock, (1962) 29 U. Chi. L.R. 237, 253.

courts are only rarely faced with the choice of either applying an inappropriate law or using a device to escape altogether from the choice of law rule in tort and delict. Unfortunately, these two factors (certainty and refinement) tend to pull in opposite directions, in that it is the simple rule which is more certain, and the refined rule which is less so. The appropriate balance between certainty and refinement is, in our view, the major test which an acceptable choice of law rule in tort and delict must satisfy.[315]

4. The relevance of the problem of ascertaining foreign law

4.19 The problem of ascertaining foreign law should not be underestimated: it may be time-consuming, expensive, inconvenient and difficult, although the rule that foreign law must be proved as a fact in our courts is accompanied by the presumption that foreign law coincides with our own unless the contrary is shown by the party who raises the question,[316] and, in Northern Ireland, by the fact that a court there may take judicial notice of the law of England and Wales and of the Republic of Ireland.[317]

4.20 However, to use the difficulty of establishing foreign law as an argument against any choice of law rule which is likely to select a foreign law is, in our view, to go too far. All choice of law rules exist to cater for those cases which, exceptionally, contain a foreign element, and it is to be expected in such cases that it may be appropriate to refer to a foreign law. We do not see why the difficulty of establishing foreign law

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315 Cf. Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368, 387-388.

316 See generally, Anton, pp. 565 ff.; Dicey and Morris, ch. 36. The difficulty of ascertaining the details of foreign law was adverted to by Lord Hodson and Lord Wilberforce in Boys v. Chaplin [1971] A.C. 356, 380, 387-388.

317 Judicature (Northern Ireland) Act 1978, s. 114(2).

should be of greater relevance in the field of tort and delict than it is in any other field of our private international law.

5. Agreement as to the applicable law

4.21 The difficulty of establishing foreign law is a strong practical argument against a choice of law rule which is uncertain to the extent that the applicable law could be any one of a number of foreign laws. To require the parties to inform themselves on the provisions of one foreign law may be a tolerable burden, but (save in exceptional cases) to require them to do so in respect of several foreign laws is not. However, it could be that the parties might find themselves able to agree on what system of law should govern their mutual liability in tort or delict, and we believe that such agreement (whether arrived at before or after the event) should be given effect to in the United Kingdom. We therefore propose that the parties should by means of contract be permitted to choose which law should govern an action between them in tort or delict. Although it seems probable that an agreement as to the applicable law would often result in the application of the lex fori, we propose that such an agreement should be effective whether or not it had this result.[318] Comments are invited on these proposals. Although it may be that the present law already permits these results, in which case no legislative change would be necessary, the matter does not appear to be settled; our view is, therefore, that any implementing legislation should expressly provide for it. Comments are invited on this view also.

6. Uniformity of result

4.22 Ideally, the outcome of an action in tort or delict would be the same whatever the country in which the litigation took place. This consideration favours our adopting a choice of law rule which is similar to those used in other countries; but uniformity of result can never be wholly achieved without agreement, at least as regards foreign countries,

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318 Cf. article 129(4) of the Swiss proposals, whereby the parties may after the event choose the lex fori only: see Appendix.

and in the absence of such agreement it is not possible to do more than bear this factor in mind. It is, however, possible to try to ensure uniformity of result within the United Kingdom, and we therefore believe that our reformed choice of law rule should be the same in Scotland, in Northern Ireland, and in England and Wales, and that in each jurisdiction it should continue to apply to cases where the foreign element springs from another part of the United Kingdom in the same way as it applies to cases with a wholly foreign element.

7. Renvoi[319]

4.23 Our discussion of the options for reform supposes that renvoi will, in principle, be excluded. In other words, a reference to a foreign law will be to its internal law and will not extend to its rules of private international law.[320] This is already the position under the present law.[321]

C. THE OPTIONS FOR REFORM

1. Options based on the lex fori

(a) The lex fori as the uniquely applicable law

4.24 The simplest possible choice of law rule would be one that applied the lex fori in every case. The arguments in favour of such a rule are principally as follows:

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319 See n. 55 above.

320 There is one area, namely defamation, where we canvass the possibility of referring not only to the internal law but also to the private international law of a foreign country: see paras. 5.49 - 5.51 below.

321 See para. 2.18 above.

(1) The application of the lex fori would mean that there would never have to be an investigation into what law was applicable. Once an action was commenced, a lex fori rule would therefore be as certain a rule as it would be possible to find.

(2) A lex fori rule would mean that it would not be necessary to ascertain and prove foreign law, and the court in the United Kingdom would always be applying a familiar law.

(3) A lex fori rule would mean that a court in the United Kingdom always applied a law which must be taken to represent our own domestic conceptions of substantive justice.

These arguments undeniably render a lex fori rule attractive. We nevertheless believe that such a rule would be indefensible in principle.

4.25 In the first place, as we have explained in Part III above,[322] it is not in our view necessary to apply the lex fori in a case involving a foreign element in order that a court in the United Kingdom may "give judgment according to its own ideas of justice". The exclusive application of the lex fori constitutes a refusal to attach any weight to the foreign elements in a case. While in some areas of law there may be a good policy reason for such refusal, this is not, in our view, the position today in the field of tort and delict. The English rule in Phillips v. Eyre has always attached some importance to a foreign law, namely the law of the place where the tort was committed; and that rule now gives the lex loci delicti greater weight than before, since the conduct complained of must now be actionable, rather than merely not innocent, under that law. The lex loci delicti has always had even greater weight in Scotland. It would in our view be wholly retrograde to retreat from this position to the extent of denying all relevance to any foreign law.

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322 At paras. 3.1 - 3.7.

4.26 Secondly, in some cases there might be several different countries in which a claimant could legitimately make his claim (for example, under the Civil Jurisdiction and Judgments Act 1982). In such cases the certainty which is said to be the advantage of a lex fori rule exists in reality only after an action has been commenced. Before then the rights and liabilities of the parties will depend entirely upon where the claimant chooses to make his claim, and the applicable law will be wholly uncertain until he does make it. In addition to being unsatisfactory for the defendant or defender, this is likely to discourage settlements.

4.27 Thirdly, the scope for injustice in such a rule is clear. For example, a defendant or defender could be made liable in the United Kingdom for an act which was lawful at the place where the act was done and in circumstances where the train of events had no connection at all with this country; conversely, the automatic application of the lex fori may be hard on a claimant whose only chance of recovery may for reasons beyond his control lie in suing here. It is no answer to say that a claimant who chooses to sue in the United Kingdom should be ready to accept the application of the lex fori, for although he may in theory have a choice of forum, he may in practice have no such choice if the wrongdoer or his assets are located here.

4.28 A fourth point is that although (as we have said[323]) there are difficulties in ascertaining and proving foreign law, the existence of the presumption that foreign law is the same as the lex fori, coupled with the possibility of agreeing the applicable law, in our view answers many of the arguments in favour of the lex fori.[324] Finally, a lex fori rule would discourage uniformity of result, even within the United Kingdom; and (to the extent that this is important) would undoubtedly encourage forum-

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323 Para. 4.19.

324 Kahn-Freund, p. 35.

shopping. It would also give rise to inconsistencies between actions commenced in the United Kingdom and actions commenced in other countries, judgments resulting from which would fall to be enforced here under, for example, the provisions of the Civil Jurisdiction and Judgments Act 1982.

4.29 None of the foreign systems of law which we have surveyed for the purposes of this paper adopts the lex fori as its exclusive choice of law rule.[325]

(b) The lex fori as basic rule subject to displacement

4.30 It could be argued, of an action that takes place in a particular country, that the fact that it does so means that it is probable that at least one of the parties has a connection with the country of the forum; and that this in turn makes it likely that, in practice, in an action in the United Kingdom, the most appropriate law will more often than not turn out to be the lex fori. It could be argued that in consequence the basic rule should be that the lex fori applies (since this would more often than not lead to the right choice of law), but that the lex fori should be capable of displacement in favour of some other law when the circumstances so warranted. Various different displacement rules are discussed below in another context;[326] they range from the very specific (for example, the application of the law of the common habitual residence of the parties instead of the lex fori), to the very general (for example, the application, instead of the lex fori, of the law of such country (if any) as had a closer and more real connection with the occurrence and the parties).

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325 See Appendix, but see also n. 270 above.

326 Paras. 4.97 - 4.123.

4.31 The introduction of exceptions to the automatic application of the lex fori of course reduces the main advantage of the lex fori rule, namely its simplicity; but, on the other hand, such exceptions would represent an attempt to introduce a degree of refinement into a rigid rule by referring to connecting factors which, where they applied, would be intended to result in the application of a system of law more appropriate than the lex fori, thereby recognising the relevance of foreign elements in the situation.

4.32 For two reasons we do not support a "lex fori with exceptions" rule. First, we have doubts about the practical effectiveness of rules of displacement when combined with a basic lex fori rule, unless the rules of displacement were mandatory and very specific. There would seem to be a clear tendency for courts which are faced with a choice of law question in the context of tort and delict to apply the lex fori if possible.[327] There can be little doubt that a "lex fori with exceptions" choice of law rule would encourage this tendency. Although this would in practice make the results of such a rule more predictable, there would be a corresponding loss in that less use than was intended would in practice be made of the possibility of displacing the lex fori in favour of the system of law indicated by a relevant exception. The introduction of exceptions into a lex fori rule might, therefore, not have the desired effect.

4.33 Our second and main objection to a "lex fori with exceptions" rule is more fundamental: for the reasons above stated, we believe that the lex fori is, as a matter of principle, the wrong place to start. In our view the lex fori has little, if any, prima facie claim to application; it is the lex loci delicti which has the greatest prima facie claim to application, and if a "basic rule with exceptions" approach is to be adopted, it ought in our view to start with the lex loci delicti. We discuss this approach below at paragraphs 4.55 - 4.125.

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327 See, e.g., Shapira, (1977) 77 Col. L.R. 248, 255-256.

4.34 The "lex fori with exceptions" approach has not been adopted in any of the foreign systems of law which we have surveyed for the purposes of this paper,[328] although a draft bill which would have had this result was submitted to the Israeli Ministry of Justice by Professor Amos Shapira.[329] The Israeli Parliament did not, however, proceed with the bill.[330]

2. Three rule-selecting approaches

4.35 A "rule-selecting" approach to choice of law is at the opposite end of the spectrum from a "jurisdiction-selecting" approach. Jurisdiction-selecting choice of law rules merely -

> "... select a particular country (or jurisdiction) whose law will govern the matter in question, irrespective of the content of that law. They do not select a particular rule of law. Theoretically at least, the court does not need to know what the content of the foreign law is until after it has been selected."[331]

Rule-selecting approaches, on the other hand, do not blindly select a jurisdiction whose domestic law will determine the outcome of the dispute; instead, from among the competing domestic rules which have some claim to be applied, a rule-selecting approach picks one domestic rule according to given criteria (which usually take account of the content of the domestic rules in question), and that domestic rule will decide the particular issue in dispute. Different rule-selecting approaches use

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328 See Appendix.

329 For text and comments see Shapira, (1972) 7 Israel L.R. 557. See also Shapira, (1977) 77 Col. L.R. 248.

330 Edwards, (1979) 96 South African L.J. 48, 79 n. 271.

331 Morris, The Conflict of Laws (3rd ed., 1984), p. 512.

different sets of criteria by which to pick the applicable domestic rule. We consider next three such approaches which have been particularly influential in the United States,[332] although not all the courts there have been influenced by the same one, and sometimes a court will adopt more than one approach.[333] Another United States development, the approach of the Restatement Second, is discussed below.[334]

(a) Governmental interest analysis[335]

4.36 The governmental interest analysis approach to choice of law is based on the notion that -

> "[w]hen a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies";[336]

and upon the view that a court at the forum is in any event bound to apply its own law if the country of the forum has such an interest. If the

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332 A different United States approach, which lays much stress on the lex fori, is that advocated by the late Professor Ehrenzweig. His approach is described in his Treatise on the Conflict of Laws (1962), in his Private International Law, General Part (1967), and also in a large number of articles.

333 The literature on developments in the United States is vast; but there is a general survey in Morse, ch. 9, and a briefer account is to be found in Morris, The Conflict of Laws (3rd ed., 1984), ch. 34. For an exhaustive analysis with particular reference to the law of the state of New York see also Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772.

334 Paras. 4.136 - 4.139.

335 This method, which was largely developed by the late Professor Brainerd Currie, is explained in a series of his articles collected under the title of Selected Essays on the Conflict of Laws (1963), and in later articles, especially "The Disinterested Third State", (1963) 28 L. & Contemp. Prob. 754. A short statement is to be found in his comment on Babcock v. Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963), which appears in (1963) 63 Col. L.R. 1212, 1233.

336 Currie, (1963) 63 Col. L.R. 1212, 1242.

country of the the forum had an interest, its law would therefore apply whatever the interests of other states. If it should transpire that there was only one interested state, the conflict would be a "false conflict",[337] and the law of the only interested state would apply. However, if the forum was disinterested, and more than one other state turned out to be interested, there would be a quandary, since the approach as originally propounded did not permit the weighing of competing interests; but a later variant on the theme of governmental interest analysis would apply the law of the state whose interest would be most impaired if its law were not applied. This gloss on the governmental interest analysis method is called "comparative impairment".[338]

4.37 There is no doubt that the governmental interest analysis approach has had a great deal of influence in the United States. The early case of Babcock v. Jackson[339] contains traces of it,[340] and it has been wholly or partly adopted in many subsequent decisions in a number of states. There are also references to it in the speech of Lord Wilberforce in Boys v. Chaplin. However, there are in our view serious objections to it as a basis for reform of our choice of law rules.

(i) In principle

4.38 In the first place it will be as well to clear up a terminological confusion. We believe that it is usually misleading in a tort or delict case

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337 This phrase is also used to mean a conflict between two laws which are the same or which would achieve the same result. See Morris, The Conflict of Laws (3rd ed., 1984), pp. 526-528; Morse, pp. 235-241.

338 The idea of comparative impairment is illustrated by Bernhard v. Harrah's Club 16 Cal. 3d 313, 546 P. 2d 719 (1976). There is a note on comparative impairment at (1982) 95 Harv. L.R. 1079.

339 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); reported in this country at [1963] 2 Lloyd's Rep. 286.

340 Babcock v. Jackson contains traces of other methods as well: "...the majority opinion contains items of comfort for almost every critic of the traditional system" (Currie, (1963) 63 Col. L.R. 1212, 1234).

to refer to the "interest" of a state in the application of the policy expressed in its laws, because (as has been pointed out[341]) a state as such can rarely be said to be interested in the outcome of private litigation. When a state is said to be "interested" it means, therefore, that the policy or purpose of the law of that state would be furthered if it were applied in the particular case. However, in our view this is in turn a misleading conception. Unless there is a public interest involved, a rule of domestic law merely reflects one view of the right balance between claimant and wrongdoer. Where there are several competing views as to the appropriate balance, the selection of one such view cannot be achieved simply by comparing them,[342] and does not seem appropriately described as furthering the policy or purpose of one of the laws in question, provided no public interest is involved.

4.39 The governmental interest analysis or comparative impairment approach does not purport to take into account the interests of the parties in dispute. In our view this is a serious argument against it. As long as "justice" is understood as meaning justice at the choice of law level, as we have discussed above,[343] our view is that -

> "... the duty of a court in a conflict of laws case, as in any other case, is to concern itself with doing justice as between the parties whose interests are involved. A solution in terms of governmental interests may have the incidental effect of doing justice between the parties but it is of secondary rather than of primary importance."[344]

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341 See Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 151; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 98-101, and see also Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368, 375-377.

342 See Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 99-101.

343 Para. 3.5.

344 Morse, p. 225. See also Anton, p. 41, and Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98.

4.40 Other objections in principle to this approach are that it lays too much emphasis on the lex fori,[345] and that it is suitable only for a federal system.

(ii) In practice

4.41 The governmental interest analysis or comparative impairment approach has a serious practical drawback, in that it requires the policy of the conflicting rules of law to be ascertained, and the interests of the states involved to be assessed. This is easier said than done.[346] The United States experience has, we believe, shown that the governmental interest analysis approach is one of extreme uncertainty and that it can be most unsatisfactory in practice.

4.42 In the case of many judge-made rules it would be difficult to say whether a particular rule had a policy at all, and if so, what it was.[347] Even where the rules of law in question are statutory, it may not be easy to ascertain their policy, and in many cases the courts have appeared merely to make assumptions instead of reaching conclusions based on

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345 The interest analysis approach has been described as "strikingly parochial": Juenger, "Conflict of Laws: A Critique of Interest Analysis", (1984) 32 Am. J. Comp. L. 1, 13.

346 There is a large literature on the difficulties involved, but see, for example, Reese, "Chief Judge Fuld and choice of law", (1971) 71 Col. L.R. 548, 557-560; Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150; Morris, The Conflict of Laws (3rd ed., 1984), pp. 519-520.

347 Currie himself recognised this when he said, of the retention in Arizona of the maxim actio personalis moritur cum persona, that "[i]f the truth were known, it would probably be that Arizona has retained that rule simply because of the proverbial inertia of legal institutions, and that no real policy is involved". (Currie, Selected Essays on the Conflict of Laws (1963), p. 143.)

evidence. For example, in Frummer v. Hilton Hotels International Inc.,[348] (an international rather than an inter-state case), the court had to search for "those considerations which led England to adopt" the Law Reform (Contributory Negligence) Act 1945. The court's view of those considerations, though plausible, is not supported by any authority, and neither is its assessment of "England's interest" in having the 1945 Act applied in the case before it. In Reyno v. Piper Aircraft Co.[349] a United States District Court found itself considering why the law of Scotland did not impose strict products liability, but only liability for negligence, and made the assumption that "the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland".[350] In Babcock v. Jackson[351] the court appeared to base its view of the policy of the Ontario statute in issue in that case upon a note in a law journal;[352] but in a later case[353] the same court appeared to concede that in the light of "further research" its original view might well have been wrong.[354] Indeed, "guest" statutes of the kind considered in Babcock v. Jackson (that is, statutes relieving drivers of liability for negligence to passengers in their cars) have been said to express any one or more of four policy

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348 304 N.Y.S. 2d 335 (1969).

349 479 F. Supp. 727 (1979). These were forum non conveniens proceedings reported further at 630 F. 2d 149 (1980) and 454 U.S. 235, 70 L. Ed. 2d 419 (1981).

350 479 F. Supp. 727, 736 (1979).

351 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep. 286.

352 191 N.E. 2d 279, 284 per Fuld J.

353 Neumeier v. Kuehner 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972).

354 Ibid., 455, quoting Reese, "Chief Judge Fuld and choice of law", (1971) 71 Col. L.R. 548, 558.

objectives,[355] and the governmental interest analysis or comparative impairment method does not appear well equipped to cope with rules of law which have multiple purposes. Examples of the difficulty in ascertaining the policy behind a rule of law and determining the extent to which that policy would be furthered by applying it in the particular case could be multiplied almost indefinitely. "Inventive minds can discover local interests and ascribe major weight to them even when factual contacts are small and the interest itself is making its first appearance in court."[356] Yet the difficulties which have been experienced in the United States, even in cases of interstate conflicts, and which are causing some disenchantment with this approach there,[357] would be as nothing compared to the difficulties which would arise in the United Kingdom, where most conflicts cases will be international and not simply between jurisdictions with similar legal systems, and where the obstacles in the way of ascertaining policies and interests would be greater than in the United States.[358]

4.43 There is the risk, therefore, that -

> "[i]n the absence of reliable information as to the intended policy function of the legal norm in question, the [governmental interest analysis] process may readily degenerate into a speculative postulation, or even fabrication, of putative underlying policies, solely on the ground of their assumed plausibility."[359]

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355 Shapira, (1977) 77 Col. L.R. 248, 262 n.69. See also Kahn-Freund, pp. 69-70.

356 Leflar, "The Nature of Conflicts Law", (1981) 81 Col. L.R. 1080, 1087.

357 Rosenberg, "The Comeback of Choice-of-Law Rules", (1981) 81 Col. L.R. 946; Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772; Juenger, "Conflict of Laws: A Critique of Interest Analysis", (1984) 32 Am. J. Comp. L. 1.

358 Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 155 -165; and see Kahn-Freund, pp. 60-61.

359 Shapira, (1977) 77 Col. L.R. 248, 262.

Further, the discovery of a policy or purpose behind a particular rule of law at its inception is not a guarantee that the rule is still sustained by the same policy or purpose. An old rule may today be retained for reasons other than those which prompted its introduction in the first place. On the other hand, it might be universally regarded as out of date and ripe for replacement.

4.44 The "comparative impairment" approach, by which it is necessary not only to ascertain the competing policies but also to balance the competing interests, seems to us to suffer from the further disadvantage that it is extremely difficult to conceive of a principled method by which to arrive at the appropriate balance, even supposing that the policies of the laws in conflict could be ascertained in the first place:

> "... it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of the others."[360]

4.45 The theoretical advantage of the governmental interest analysis or comparative impairment approach is its capacity to deal with conflicts cases on a flexible and individually-tailored basis. In practice, this seems hard to attain, and the theoretical flexibility gives way to a process which is at once unprincipled and unpredictable - "a discretionary system of equity".[361] This, together with our objections in principle to an approach based on the furthering of state policy rather than the doing of justice at the choice of law level leads us to believe that the

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360 Neumeier v. Kuehner 286 N.E. 2d 454, 457 (1972), per Fuld C.J.

361 Anton, p. 40.

governmental interest analysis or comparative impairment approach is not a suitable option for reform of our own choice of law rule in tort and delict.[362] We seek comments on this view.

(b) Principles of preference

4.46 In 1933, Professor David Cavers drew attention to the deficiencies of a purely jurisdiction-selecting choice of law rule.[363] He proposed an alternative method which has much in common with the governmental interest analysis method discussed in the immediately preceding paragraphs, but which is also significantly different from it.[364]

4.47 The two methods have in common an attempt to distinguish between a "true conflict" and a "false conflict"[365] by inspecting the laws in conflict in the light of their purposes and the circumstances of the case. Where such inspection revealed a false conflict, neither the governmental interest analysis nor the principles of preference approach would go any further. However, in the case of a true conflict, the governmental interest analysis method would (in its pure form) apply the lex fori, or (in its "comparative impairment" form) attempt to weigh the competing state interests and apply the law of that state whose interests would be most impaired by failure to do so. Cavers, on the other hand, would neither resort to the lex fori nor attempt to weigh the competing

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362 Many before us have reached the same conclusion: for example, Anton, pp. 33-42; Cheshire and North, p. 29; Morris, The Conflict of Laws (3rd ed., 1984), pp. 518-520, 531; Morse, pp. 225-226; Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 166; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98.

363 "A critique of the choice of law problem", (1933) 47 Harv. L.R. 173.

364 The views of Professor Cavers are also explained in The Choice of Law Process (1965) and "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75.

365 See above, para. 4.36 and n. 337.

state interests, but would instead resort to a system of what he called "principles of preference". He originally suggested five such principles for use in tort and delict cases,[366] and has subsequently added a sixth for use in products liability cases.[367] Whereas Cavers originally thought his principles of preference should be used only in cases of true conflicts, he later came to believe that they might be useful at an earlier stage, when deciding whether a conflict was false or avoidable.[368]

4.48 While it is not essential to the Cavers approach that the particular principles devised by him should be adopted without modification, we quote here his first principle for the purposes of illustration -

> "1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship."[369]

The other principles are phrased in similar language. Each of them identifies certain countries whose law might be applied in the particular circumstances which it contemplates; and contains a stated criterion,

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366 Cavers, The Choice of Law Process (1965), ch. VI; and see also ch. V.

367 Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703, 728-729.

368 Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 153.

369 Cavers, The Choice of Law Process (1965), p. 139. The five principles in the field of tort and delict are summarised in Morris, The Conflict of Laws (3rd ed., 1984), p. 522.

framed in terms of the content of the laws so identified, by means of which one of those laws is selected as the applicable law. Each criterion reflects a value judgment[370] as to what the result should be in the case envisaged.

4.49 The principles of preference approach is of great interest, especially (like the governmental interest analysis approach) in its attempt to identify false conflicts, but further (unlike that approach) in its attempt to formulate, on some principled basis, rules for deciding which of two competing laws should be applied. There is evidence that the principles of preference approach has influenced the court in some United States cases,[371] and in our view it is a more attractive one than the governmental interest analysis or comparative impairment method. However, there are nevertheless serious objections to the adoption of such an approach in the United Kingdom.

4.50 In the first place, it relies in its initial stage on the ascertainment of the policy or purpose of the competing rules of law, and we have explained above[372] that we think this is wholly impracticable. Secondly, the number of principles of preference which would be required in the field of tort and delict would in our view be large, and while this might not have caused any particular difficulty if the method had emerged as a result of a gradual process of judicial evolution, it seems less well suited to a ready-made statutory scheme, which would have to

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370 Cavers, The Choice of Law Process (1965), p. 213.

371 See, for example, Cipolla v. Shaposka 267 A. 2d 854 (1970); Neumeier v. Kuehner 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972). In the latter case, Fuld C.J. formulated three principles to deal with disputes between drivers and passengers in motor vehicles.

372 Paras. 4.41 - 4.45.

be complex and long. Accordingly we do not think a system based on this approach could be adopted in the United Kingdom,[373] and we invite comments on this view.

(c) Choice-influencing considerations

4.51 Professor Robert Leflar has attempted to distil from the cases those considerations which in fact influence the choice of law.[374] He is not the first or the only person to have done so,[375] and section 6 of the United States Restatement Second contains a similar list of choice of law principles,[376] but Leflar's "effort to systematize and correlate the choice-influencing considerations"[377] produced the following list of five:[378]

(A) Predictability of results;

(B) Maintenance of interstate and international order;

(C) Simplification of the judicial task;

(D) Advancement of the forum's governmental interests;

(E) Application of the better rule of law.

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373 See Kahn-Freund, p. 58; Morris, The Conflict of Laws (3rd ed., 1984), pp. 523-531; Morse, p. 259.

374 See Leflar, American Conflicts Law (3rd ed., 1977), s. 96 and ch. 10; and also Morse, pp. 263-267.

375 For example, see also Cheatham and Reese, "Choice of the Applicable Law", (1952) 52 Col. L.R. 959.

376 The Restatement Second is discussed below at paras. 4.136 - 4.139.

377 Leflar, American Conflicts Law (3rd ed., 1977), p. 195.

378 Ibid.

4.52 These considerations are not listed in order of priority,[379] and their relative importance would vary according to the area of law involved;[380] and further, as Leflar says -

> "[i]dentification of the relevant choice-influencing considerations and attachment of appropriate significance to each of them is a task that will have to be worked at indefinitely, with little prospect of complete agreement among either judges or commentators."[381]

4.53 However, the intention behind this approach is that the application of all the choice-influencing considerations in the circumstances of a particular case will provide a "test of the rightness of choice-of-law rules and decisions";[382] and the approach has been used in a number of United States decisions as a means of showing which law should be applied.[383] The Leflar method of resolving choice of law problems is a different kind of approach from those discussed elsewhere in this Part. It does not provide an objective choice of law rule; it identifies and classifies common factors which may have influenced decisions over a period of judicial evolution, but which do not by themselves point in the direction of one or another of the rules in conflict.

4.54 We have already given reasons why we do not believe that the fourth of the above-listed choice influencing considerations would be satisfactory,[384] and we do not think that the fifth is acceptable. Quite

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379 Ibid.

380 Ibid.

381 Ibid., 193.

382 Ibid., 194.

383 See, for example, Clark v. Clark 222 A. 2d 205 (1966); Heath v. Zellmer 35 Wis. 2d 578, 151 N.W. 2d 664 (1967); Conklin v. Horner 38 Wis. 2d 468, 157 N.W. 2d 579 (1968); Milkovich v. Saari 203 N.W. 2d 408 (1973); Hunker v. Royal Indemnity Co. 57 Wis. 2d 588, 204 N.W. 2d 897 (1973).

384 See above, paras. 4.41 - 4.45.

apart from this, however, we have reached the view that, although this approach is illuminating in the context of a judge-made rule, as a candidate for our reformed choice of law rule it suffers from a major defect, which is that it is inherently unacceptably subjective and uncertain, and we doubt whether any list of choice-influencing considerations could of itself constitute a self-sufficient statutory choice of law rule. Comments are invited.

3. Options based on the lex loci delicti

(a) Reasons for applying the lex loci delicti

4.55 The principle that the lex loci delicti should apply in cases of foreign torts and delicts is old-established and forms the basis of the choice of law rule in many foreign countries.[385] It has the predominant role in the present Scottish choice of law rule in delict,[386] and appears in England and Wales and in Northern Ireland as the second limb of the rule in Phillips v. Eyre. A choice of law rule based on the application of the lex loci delicti is a traditional jurisdiction-selecting rule which has nothing in common with the new United States approaches discussed immediately above. It is noteworthy, however, that at least one of the new approaches to the problem of choice of law in tort and delict concedes that in many cases the lex loci delicti will be the appropriate law to apply, or at least to take as a starting point.[387] Although, as we shall see below,[388] we do not believe that a bare lex loci delicti choice of

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385 See Appendix for some examples.

386 See paras. 2.37 - 2.40 above.

387 E.g., Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, and see the Restatement Second. We discuss the proper law approach below at paras. 4.126 - 4.142.

388 Paras. 4.92 ff.

law rule is acceptable, the arguments in favour of applying the lex loci delicti at least as a prima facie rule are strong and are principally as follows.

4.56 In the first place there is a practical argument. Where it is alleged that a tort or delict was committed by one party against another, one objective fact which unites the parties and the occurrence is the place where the tort or delict was alleged to have occurred (the "locus delicti"). In most cases this place will be easily identifiable.[389] In many cases there will be no other objectively ascertainable factor which is common to the parties and the occurrence: the parties will usually be connected only by the tort or delict committed by one against the other. In the case of a jurisdiction-selecting rule, which seeks to connect a particular case with the appropriate legal system by means of a "connecting factor", there would in such a case appear to be no other connecting factor which could be resorted to if the lex fori is not to apply.[390] A rule which applies the lex loci delicti is clear, simple, and certain; its results are easily predictable; and in the ordinary case without special features there is no other obvious candidate as the applicable law apart from the lex fori, which, as we have said above, we do not believe would be an acceptable solution.

4.57 Quite apart from any common factor uniting the parties and the occurrence, there are reasons of principle for applying the lex loci delicti. First, if (as will in practice be likely) one of the parties to the tort or delict is himself independently connected with the locus delicti, for example through habitual residence there, it is right that he should in the ordinary case be able to rely on his own local law for his rights and be subject to such liabilities as are prescribed by that law. This principle has been expressed as follows:

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389 We discuss the problem of the multi-state case below, at paras. 4.61 - 4.91.

390 We discuss options based on the lex fori above, at paras. 4.24 - 4.34.

"the legal position of a person who, in his own country, acts or is affected by an act, or takes part in a transaction, should not be adversely affected by a foreign element ... which it was not open to him to avoid".[391]

This would in addition appear likely to correspond with his expectations after the tort or delict had occurred; and it does not appear likely that the expectations of the other party would be any different. The case is stronger where both parties are connected with the locus delicti independently of the tort or delict. The application of the lex loci delicti is thus in our view consistent with the demands of justice at the choice of law level,[392] at least in the ordinary case which presents no special features: it is the law which it is most appropriate to apply.

4.58 The application of the lex loci delicti would usually also correspond with the liability which a wrongdoer who had taken such matters into account would expect to be imposed upon him by a court at the place where his activities were being carried on. We have explained above[393] that this consideration does not necessarily mean that a court in the United Kingdom should also apply that law, but it would appear simpler and more satisfactory if the courts here did so nonetheless.

4.59 Another reason for applying the lex loci delicti is that this would promote uniformity and discourage forum shopping. It would encourage uniformity in two ways. The first is that the application of the lex loci delicti is a widely accepted choice of law rule, and the results of an action in the United Kingdom on a foreign tort or delict would therefore tend to be the same as if the action had been brought elsewhere. The second is that the result of an action in the United

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391 Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 102.

392 On this point see Jaffey, "Choice of law in tort: a justice based approach", (1982) 2 L. S. 98, passim.

393 Para. 4.11.

Kingdom will also tend to be the same as that of an action brought in the country where the tort or delict occurred, for in the latter case the courts are likely to apply their own lex fori, which will be the same as the lex loci delicti. This will be particularly important if the foreign judgment then falls to be recognised and enforced in the United Kingdom, for example under the Civil Jurisdiction and Judgments Act 1982. Since the results of an action in the United Kingdom and of an action at the locus delicti would, under a lex loci delicti rule, tend to be the same, there will be no disadvantage to the claimant in suing in his own courts, if it is practicable to do so,[394] and this will usually be more convenient and less expensive.

4.60 Our provisional conclusion is, therefore, that the lex loci delicti is in many cases both in principle and in practice the most appropriate law to apply, and is therefore a suitable basis upon which to build a choice of law rule in tort and delict. However, we have reached the view that the application of the lex loci delicti in all cases, without exception, would not be satisfactory. The application of the lex loci delicti is not appropriate in all circumstances. Experience abroad, especially in the United States, has shown that a bare lex loci delicti rule may lead to injustice, and many countries have introduced exceptions to the application of the lex loci delicti. Our view is, however, that a lex loci delicti rule with exceptions has clear merits. We discuss a number of possible exceptions below.[395] First, however, it is necessary to consider what is meant by the locus delicti (and hence also the lex loci delicti) in a case where different elements in the train of events occur in different countries.

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394 For example, he may take advantage of article 5(3) of the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, or of the new R.S.C., O. 11, r. 1(1)(f) when this is in force : see n. 404 below.

395 Paras. 4.97 - 4.125.

(b) The definition of the locus delicti in multi-state cases

(i) Introduction

4.61 In most cases the whole train of events making up a tort or delict occurs in a single country. In such a case the question of defining the locus delicti does not arise. However, any rule based on the lex loci delicti would also have to cope with a tort or delict whose constituent elements occurred in different countries, however infrequent such cases may in practice be. We refer to such a case as a "multi-state" case.

4.62 It would, of course, be possible to confine the lex loci delicti rule to single-state cases only, and to develop a different rule for multi-state cases, but we do not believe that such a solution is necessary. We believe that if the lex loci delicti is to be adopted as the basic rule, some way of accommodating the multi-state case should if possible be found; and, as will appear below, we believe that there exist ways in which this can be done. An alternative approach would be to adopt a rule which did not assume the existence of a locus delicti: one such is the proper law approach, which we discuss below.[396]

4.63 In the absence of a single locus delicti the reasons of policy which indicate the application of the lex loci delicti are no longer adequate without further refinement. To take the simplest case, where a wrongdoer acts in one country and causes harm to a claimant in another country, there can no longer be said to be one single country with which the train of events has the strongest prima facie connection; there are, instead, two such countries. Arguments based on the expectations of the parties now pull both ways, for the actor may feel wronged if he is not allowed to rely on the law of the country where he acted, and the claimant may feel that he should be allowed to rely on the law of the

396 Paras. 4.126 - 4.142.

country where he was harmed. However, as Kahn-Freund[397] and others[398] have pointed out, while it might be permissible to allow more than one country to take jurisdiction in a multi-state case, thus making a definition of the locus delicti unnecessary in the jurisdictional context,[399] this is clearly unacceptable for choice of law purposes: there must be some way of choosing one law which is to apply. In the context of a lex loci delicti rule it is therefore necessary, in a multi-state case, to select one country only as the locus delicti, and to use the law of that country as the lex loci delicti. (The application of the lex loci delicti as so identified would then be subject to the same exceptions to the general lex loci delicti rule as were provided for in the ordinary single-state case. We discuss such exceptions in the next section).

4.64 Examples of multi-state cases are -

(i) A defective machine is manufactured in England and is exported to France, where it causes injury and loss of profit. The locus delicti might be England or France.

(ii) A Scotsman is injured, by a car driven by another person, in a road accident in France. He then returns home to Scotland, where he dies as a result of his injuries. The initial injury is thus suffered in France, and the consequential death in Scotland. The locus delicti might be France or Scotland.

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397 [1974] III Hague Rec. 137, 405-406.

398 For example, Collins, "Where is the locus delicti?" (1975) 24 I.C.L.Q. 325, 327-328; Cheshire and North, pp. 287, 289.

399 For example, in Handelskwekerij G.J. Bier B.V. & Stichtung Reinwater v. Mines de Potasse d'Alsace S.A. [1976] E.C.R. 1735, [1978] Q.B. 708 (European Court of Justice) it was held that under Article 5(3) of the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters the claimant could at his option sue either at the place where the damage occurred or at the place of the event which gave rise to and was at the origin of the damage. See n. 404 below.

(iii) The accident in the previous example was caused, not by the driver of the other car, but by negligent servicing of that car in Italy. The locus delicti might be France, Scotland, or Italy.

(iv) At meetings in Spain, Ireland and Portugal, conspirators agree to reduce the German and Swiss profits of a multinational company, by means of acts done in Austria and Italy. The locus delicti might be any of the countries mentioned, or even the country where the multinational company had its head office.

4.65 Although the one law chosen as the lex loci delicti in a multi-state case will be that of a country which it is convenient to call the locus delicti, it is fictitious (as can be seen from the examples in the previous paragraph) to say of a train of events whose elements occurred in various places that "the tort" or "the delict" can be localised, on some ostensibly objective basis, in only one of those places.[400] In this context, therefore, the selection of one country as the locus delicti does not imply that "the tort" or "the delict" could be said to have occurred there; it implies only that, for policy reasons, the law of that country should in principle apply in a multi-state case. The phrases "locus delicti" and "lex loci delicti" are thus simply used as a convenient shorthand: they bear a special meaning when the different elements of a wrong occur in different countries.

4.66 In this section we consider various ways of identifying the locus delicti in a multi-state case. What follows is relevant only to the multi-state case. It should be stressed that none of these problems occurs in a case concerning a train of events confined to one country. In such a case the identity of the locus delicti presents no difficulty at all.

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400 See Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248, 1250.

(ii) The present law

4.67 Although our present choice of law rule in tort and delict potentially requires the locus delicti to be defined in a multi-state case, it appears that there are no reported cases in which the English courts have been called upon to do so in the context of the rule in Phillips v. Eyre, although there are cases where the tort was alleged to have occurred in England.[401] The situation in Scotland appears to be the same.[402] Relevant decisions appear also to be rare in other countries where the rule in Phillips v. Eyre prevails.[403]

4.68 The question has, however, frequently arisen in a jurisdictional context, for under R.S.C., O.11, r.1(1)(h), a writ may be served out of the jurisdiction -

> "if the action begun by the writ is founded on a tort committed within the jurisdiction."[404]

A similar rule has existed in other jurisdictions (although not in Scotland[405]) for many years. Although the jurisdiction cases will be mentioned as appropriate below, they offer only limited assistance in

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401 See para. 2.21 above.

402 See para. 2.44 above.

403 See, however, Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R. (3d) 321.

404 This will in due course be altered by the R.S.C. (Amendment No.2) Rules 1983 (S.I. 1983 No. 1181) to take account of the Civil Jurisdiction and Judgments Act 1982. The new provision, which will be R.S.C., O. 11, r.1(1) (f), will permit service of a writ out of the jurisdiction if in the action begun by the writ "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction". Northern Ireland has corresponding provisions: R.S.C. (Northern Ireland) (Revision) 1980, O.11, r.1(1)(h), which will be altered by R.S.C. (Northern Ireland) (Amendment) 1984 (S.R. 1984 No. 110).

405 Service is irrelevant to questions of jurisdiction in Scotland.

deciding how to approach the question of the locus delicti. The reasons for this are as follows:[406]

(a) they decide only whether a tort or delict was committed within the jurisdiction: they do not necessarily decide where a tort or delict was committed, if not within the jurisdiction;

(b) the distinction is sometimes blurred between the commission of a tort or delict within or outside the jurisdiction and the discretion of the court to permit or deny leave to serve process out of the jurisdiction;

(c) the criteria for deciding whether or not the court should take jurisdiction need not be the same as the criteria for determining the locus delicti for choice of law purposes.

(iii) The "place of acting" rule or the "place of result" rule[407]

4.69 The solutions most usually canvassed for the problem of determining the locus delicti in a multi-state case are either that the locus delicti should be considered as the place where the wrongdoer acted (a "place of acting" rule), or, alternatively, that the locus delicti should be the place where the conduct of the wrongdoer harmed the claimant or his interests (a "place of result" rule).[408]

4.70 The main argument of principle for adopting a place of result rule as opposed to a place of acting rule is that a place of result rule is more in accordance with the modern view of the law of tort and

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406 See Morse, p. 115.

407 See generally, Webb and North, "Thoughts on the place of commission of a non-statutory tort", (1965) 14 I.C.L.Q. 1314; Morse, pp. 113-123.

408 It is, perhaps, arguable that the second limb of the rule in Phillips v. Eyre presupposes a choice of the "place of acting" rule, since it refers to "the law of the place where it [the act] was done": (1870) L.R. 6 Q.B. 1, 29. The continental systems also appear to favour the place of acting rule, although modern French doctrine appears, at least in certain circumstances, to favour the place of the result: Batiffol et Lagarde, Droit International Privé, Tome II (7th ed., 1983), s. 561; Morse, p. 115.

delict.[409] According to this view the law of tort and delict does not exist to deter the wrongdoer from harmful conduct, or to punish him for it (this being the province of the criminal law), but to provide a means whereby the equilibrium between the claimant's interests and the wrongdoer's interests may be maintained and, if upset, readjusted. Since the equilibrium will be upset by the wrongdoer's conduct (whether intentional or not) it is the claimant's interests which stand to be adversely affected, and it is therefore the law of the place of result, not that of the place of conduct, which should apply. It is, in other words, thought to be just that the rights of a person who has suffered injury should be regulated according to the law of the country where the injury occurred - which, in the usual case, will be a country with which that person is independently connected, probably through habitual residence.

4.71 The countervailing argument, which supports the application of the law of the place of acting (at least where results were not foreseeable in the place where they in fact occurred) is that the actor must be taken to act in accordance with the standards of his own environment, and that he should be judged according to those standards. It would therefore be wrong to make the actor liable according to the law of the place of result if his conduct and the results which flowed from it would give rise to no liability under the law of the place of acting.[410] This argument must presumably be based in fact on the view that the law

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409 Morse, pp. 118-119. Although we believe this view to be commonly accepted, it is not unanimous, as is pointed out by Webb and North, (1965) 14 I.C.L.Q. 1314, 1357-1358. Contrast, for example, Salmond and Heuston on the Law of Torts (18th ed., 1981), p. 11: "[t]he law of torts exists for the purpose of preventing men from hurting one another..."; Fridman, "Where is a Tort Committed?" (1974) 24 U. Tor. L.J. 247, 278: the law of torts "is primarily concerned with determining what sort of conduct should be capable of being castigated as wrongful and therefore potentially actionable".

410 This argument is stated by Morse, pp. 113 and 119; and is put (for example) by Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 Tul. L.R. 4 and 165; and by Fridman, (1974) 24 U. Tor. L.J. 247.

of the place of conduct is the most appropriate law to apply, irrespective of the accident of liability, for the law of the place of result might not, after all, impose liability, while the law of the place of conduct might do so.

4.72 A strict place of conduct rule would, however, ignore the fact (if it were so) that the actor foresaw or even intended results in the place where they in fact occurred. In such a case the actor could not properly claim to be prejudiced by the application of the law of the place of result. Supporters of the place of acting rule therefore concede that, if the rationale of the rule is that the actor must be taken to have acted in accordance with the standards of the community, the relevant communities must include those where the actor could reasonably expect that his conduct might result in harmful consequences.[411] If results were foreseeably produced in the place where they in fact occurred, the law of the place of result would apply, and not the law of the place of acting.[412]

4.73 Whether it is the place of acting or the place of result which should be considered as the locus delicti in a multi-state case seems to us to depend very much upon the type of tort or delict in question and upon the circumstances of the case. The argument in favour of applying the law of the place of conduct is clearly strong where the actor's conduct is influenced by his having taken the law into account before undertaking an activity and where it was not foreseeable that results would be produced in another country. It is strongest where the actor is placed under a duty

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411 E.g., Rheinstein (1944) 19 Tul. L.R. 4, 25-27; and see Fridman, (1974) 24 U. Tor. L.J. 247, 262.

412 This seems to be the effect of article 129(2) of the Swiss proposals. Contrast article 45(2) of the Portuguese civil code, according to which the law of the state of injury applies instead of that of the place of principal activity in cases where the actor could foresee the occurrence of damage in that state, but only if the law of the state of injury holds the actor liable and the law of the state where he acts does not. See Appendix.

(as opposed to a mere licence[413]) to act or not to act in a particular place or in a particular way: in such a case it seems unjust to him to subject him to the law of another country (irrespective of whether or not the law of that country would in fact impose liability).[414] However, the arguments for applying the law of the place of conduct seem weaker, and the arguments for applying the law of the place of result stronger, where the actor's conduct was not consciously influenced by the law of the country where he acted, and also in any case where the actor foresaw that his conduct might produce results in another country.

4.74 A place of conduct rule fails to take into account the interests of the claimant, whose expectations will (at least after the event, if not before) be based on his rights and liabilities under the law of the country where he was harmed and with which he will usually be independently connected. (If he were not so connected there might in the circumstances of the particular case be grounds for not applying the lex loci delicti at all, as we envisage below.[415]) This argument is in our view a strong one in the case of a tort or delict where what is in issue is the redistribution of losses, but "... there is value in paying some consideration to the purpose behind the rule of law which characterises the conduct in question as tortious",[416] and the essential element in a tort or delict is not always the redistribution

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413 As in Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R. (3d) 321. See para. 5.70 below.

414 The first United States Restatement provided that "[a] person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state": section 382(1). Section 382(2) went further and similarly exempted the actor where he acted "pursuant to a privilege conferred by the law of the place of acting". These provisions are remarkable because they are wholly inconsistent with the philosophy underlying the adoption elsewhere in the first Restatement of the "place of last event" rule, described below at para. 4.85.

415 Paras. 4.92 ff.

416 Webb and North, (1965) 14 I.C.L.Q. 1314, 1357; and see Cheshire and North, p. 289.

of monetary losses: some torts and delicts, for example, are actionable without proof of damage.[417] In such cases the law may seem to be more deterrent or "admonitory" than compensatory in its objective,[418] and thus aimed more at the conduct of the wrongdoer than at the loss suffered by the claimant; and if this is so it may be right to judge the matter according to the standards of justice of the place of conduct, not of the place of harm.

4.75 One way out of the dilemma of defining the locus delicti in terms either of the place of acting or the place of result would be to adopt what may be termed an "elective solution".[419] The essence of an elective solution is that where elements of the train of events occur in different countries, a choice is made, either by the claimant[420] or by the court, between the various legal systems with a claim to application. Where the choice is made by the court, the law selected is that most favourable to the claimant.

4.76 This method does not appear to have a great deal of support.[421] It seems to us to suffer from three major defects. In the

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417 The E.E.C. Draft Convention deals separately with events resulting in damage or injury (article 10) and events not resulting in damage or injury (article 13): see Appendix.

418 A distinction advocated by Ehrenzweig: "The Place of Acting in International Multistate Torts: Law and Reason versus the Restatement", (1951) 36 Minn. L.R. 1.

419 See Morse, pp. 124 ff.

420 It would be possible for the choice to be made by the wrongdoer, but the same arguments apply. We envisage, however, that if both of the parties to an action agree on the applicable law, then that law should apply: see para. 4.21 above.

421 Cook supported it: The Logical and Legal Bases of the Conflict of Laws (1942), ch. 13. See also Cowen, "The locus delicti in English private international law", (1948) 25 B.Y.I.L. 394; Carter, (1965-66) 41 B.Y.I.L. 440; and Morse, p. 125. It is used in the Federal Republic of Germany, and is adopted for certain purposes in the Swiss proposals: articles 131, 134 and 135: see Appendix.

first place, to favour one party so crudely over the other does not seem the right way to reach the appropriate equilibrium between the interests of the claimant and those of the alleged wrongdoer. Secondly, the applicable law would never be known until the choice had been exercised: this is unsatisfactory for the alleged wrongdoer, and would not tend to promote settlements. Thirdly, it may well be impossible to decide on an objective basis or at all which law is, in fact, most favourable to the claimant. In such a case, if the choice were the court's, it would have to choose on the basis of criteria which it would be impossible to formulate in advance. This seems unsatisfactory. If the choice were the claimant's, this objection is of less weight, since it would be open to him to make his own choice which did not depend on an objective assessment of favourability.

4.77 We have therefore reached the view that this is not a suitable solution to the problem of the multi-state tort or delict in the context of a lex loci delicti rule. Our view is that it is necessary to provide rules which select either the place of acting or the place of result as the locus delicti in a multi-state case. We consider first the torts and delicts with which this Part is principally concerned - namely personal injury, death, and damage to property. We then consider whether a general rule can also be formulated for other types of tort and delict. In Part V we consider whether other particular types of tort and delict require special definitions of the locus delicti in a multi-state case. It should be borne in mind throughout this section that the problem of defining the locus delicti arises only where elements in the train of events occur in different countries. It does not arise at all where the whole train of events occurred in a single country.

(iv) Definition of the locus delicti in multi-state cases of personal injury, death, and damage to property

4.78 Whatever may be true of other types of tort and delict, we have formed the provisional view that the arguments in favour of applying the law of the place of result are stronger than those in favour of applying the law of the place of conduct in the types of tort and delict with which this Part is principally concerned, namely personal injury, death, and

damage to property. In such torts and delicts the primary purpose of the law is to secure a redistribution of loss by means of compensation; and they are also likely to arise from accidents. In such cases the expectations of all the parties and the purposes of the law will usually make it entirely appropriate to apply the standards of justice of what might be loosely termed the "claimant's law", not those of the "wrongdoer's law", in the resolution of a dispute between them.

4.79 This view may be described as "claimant oriented" rather than "wrongdoer oriented", and this is in our view the correct emphasis in cases of personal injury, death, and damage to property. It is, however, important to note that a definition of the locus delicti in terms of the place of result is claimant-oriented only at the choice of law level. Neither a place of acting rule nor a place of result rule favours either party in terms of the final result of a dispute, since the final outcome will depend upon the content of the domestic law applied.

4.80 Our conclusion that the locus delicti should be considered as the place of result in multi-state cases of personal injury, death, and damage to property is, in our view, supported by practical considerations. In the first place, as we have mentioned above,[422] a place of acting rule would be unsatisfactory unless qualified by a test of foreseeability. However, the introduction of such a qualification into the definition of the locus delicti would in our view be undesirable. It would always be potentially unclear whether the law of the place of acting or the law of the place of result was to prevail, for this might always require an investigation into the question of foreseeability. Further, the liability of the alleged wrongdoer under the substantive applicable law (however selected) might well depend in any event upon a test of foreseeability provided for by that law; in such a case the introduction of another different notion of foreseeability at the earlier choice of law stage seems likely to lead to complication and confusion. By contrast, a place of

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422 Para. 4.72.

result definition does not require to be qualified by a test of foreseeability. It rests on the ground that the conduct of the wrongdoer should be judged according to the standards of the place where results were in fact produced. In cases of personal injury, death, and damage to property this is in our view right in principle.

4.81 Secondly, although both the place of conduct and the place of result raise problems of definition, it is the place of conduct which raises the greater difficulty. It may, for example, be impossible to ascertain where the conduct took place; but, more significantly, opinions may also differ as to how the relevant conduct should be defined. For example, if damage occurs because a car had defective tyres, does the negligent conduct consist in driving the car in that condition, or in failing to inspect the tyres before setting out?[423] In some cases decided for jurisdictional purposes, the English courts have produced curious definitions of conduct. For example, in Castree v. E.R. Squibb & Sons Ltd.[424] the substantial wrongdoing was said not to be the defective or incorrect manufacture of a German product, but "putting on the English market a defective machine with no warning as to its defects".[425] Finally there is

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423 Webb and North, (1965) 14 I.C.L.Q. 1314, 1319 n. 23.

424 [1980] 1 W.L.R. 1248.

425 Ibid., 1252. This follows Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458, where the wrongdoing was a "failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy" (ibid., 469): see Collins, "Some aspects of service out of the jurisdiction in English law", (1972) 21 I.C.L.Q. 656, 663-666. Cf. Buttigeig v. Universal Terminal & Stevedoring Corporation [1972] V.R. 626 and Macgregor v. Application des Gaz [1976] Qd. R. 175. In George Monro Ltd. v. American Cyanamid & Chemical Corporation [1944] 1 K.B. 432, Goddard L.J. thought the case concerned "the sale of what was said to be a dangerous article without warning as to its nature" (p.439); while Du Parcq L.J. said that "the corporation put on the market a dangerous substance with written instructions to use it in a dangerous way" (p.440), and described this as an act of "commission" (ibid.): Webb and North, (1965) 14 I.C.L.Q. 1314, 1326 n. 50. See also Adastra Aviation Ltd. v. Airparts (N.Z.) Ltd. [1964] N.Z.L.R. 393.

the problem of localising an omission.[426] An omission may be something that could have been done: but what if it could have been done in any of a number of places? Alternatively, it may be something that should have been done: but if so, by whose law is the duty to act imposed?[427] What if more than one law imposed a duty to act?

4.82 In the cases of personal injury, death, and damage to property the policy reasons for applying the law of the place of result would appear to indicate that this should be the place where the conduct of the wrongdoer first impinged upon the claimant or his property, not where the injury became apparent or where the consequential loss occurred, since these may well depend upon where the claimant himself chooses to go. Accordingly, in cases of personal injury and damage to property, the locus delicti would be the country where the person or property was when the injurious or damaging event occurred, even though its full effects became apparent only later. In cases of death, the relevant place must in our view be the country where the deceased was when he was fatally injured, not where he actually died.[428] A definition of the locus delicti in these terms will, we believe, be clear and simple, and represents the correct balance between the interests of the claimant and those of the wrongdoer in cases of personal injury, death, and damage to property.

(v) Definition of the locus delicti in other multi-state cases

4.83 The question now arises whether defining the locus delicti as the place of result will be appropriate for multi-state torts and delicts other than personal injury, death, and damage to property. We consider

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426 See Rabel, The Conflict of Laws, Vol. 2 (2nd ed., 1960), pp. 312-313.

427 The Portuguese civil code says that "... in the case of liability for omissions, the applicable law shall be the law of the place where the party responsible should have acted" (article 45(1): see Appendix).

428 This is implicit in Koop v. Bebb (1951) 84 C.L.R. 629.

a number of particular torts and delicts in Part V below; but our provisional conclusion is that a general definition in terms either of the place of acting or of the place of result which is applicable to all torts or delicts not involving personal injury, death or damage to property would be unsatisfactory. We have two reasons for this view. The first is that, as we have said, the policy reasons for applying either the law of the place of conduct or the law of the place of result differ from one tort or delict to the next, but we do not believe that it would be practicable to conduct an investigation on a case-by-case basis into the policy or purposes of the substantive laws in conflict.[429] As between the place of conduct and the place of result our view is that, on the whole, the policy considerations which we have outlined above would tend to favour the place of result in more cases than simply personal injury, death, and damage to property; but we are not confident that such a definition would be suitable in all cases.

4.84 Our second reason is that a tort or delict not resulting in personal injury, death, or damage to property may well involve complex facts, in that there may be no single place of conduct and no single place of result. An example might be that cited as (iv) in paragraph 4.64 above: the case of an international conspiracy.[430] Further, problems of definition will, if anything, be greater, since outside the field of personal injury, death and damage to property, the place of result as well as the

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429 We have discussed options which would involve such an investigation above, at paras. 4.36 - 4.54. See also Kahn-Freund, (1969) 53 I Ann. Inst. de droit international at pp. 451-452, where he questions whether it is possible to define the locus delicti in the light of a distinction between liability for fault and liability for risk, or between admonitory torts and enterprise liability.

430 An example of such a case is Petersen v. AB Bahco Ventilation (1979) 107 D.L.R. (3d) 49, and see also Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) (C.A.), 6 March 1981 (unreported), per Lord Denning M.R. The facts of Lonrho appear from the report of the appeal to the House of Lords: [1982] A.C. 173. British Airways Board v. Laker Airways Ltd. [1984] 3 W.L.R. 413 also concerns an alleged conspiracy.

place of conduct may be hard to define. A definition which incorporates the idea of causation does not appear to be desirable. Although in most cases it will be perfectly clear what results have been caused by the wrongdoer's conduct, the introduction of this idea at the choice of law level is bound to lead to uncertainty in difficult cases. Further, questions of causation may be thought best left to the substantive applicable law: two notions of causation in the same case, one for choice of law purposes and one for substantive purposes, might (as with the idea of foreseeability discussed above[431]) seem too complicated. A definition in terms of "damage", "harm", "loss" or "injury" may be misleading,[432] either because none of these things may in fact be present, in which case it would be meaningless to define the place of result by reference to any of them, or because the claimant may suffer different types of damage or loss, which, while arising out of the same event, may occur in different places. Further, the location of economic loss may prove elusive.[433]

4.85 An apparently attractive way of defining the locus delicti was adopted by the first United States Restatement. Section 377 provided that -

> "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

This definition seems to avoid all difficulties by using a general principle which can easily be applied to the particular tort or delict in question. However, such a definition is unsatisfactory, for it is now seen to be circular: the last event cannot be identified except by reference to a system of law, but the system of law applicable cannot be selected until the last event has been identified. There might also be more than one

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431 Para. 4.80.

432 See Rabel, The Conflict of Laws, Vol. 2 (2nd ed., 1960), pp. 323 ff.

433 But see Ichi Canada Ltd. v. Yamauchi Rubber Industry Co. (1983) 144 D.L.R. (3d) 533, where for the purposes of service of a writ outside the jurisdiction, the tort of inducing breach of contract was considered as committed in the place where economic loss was suffered.

place of last event, for example where a tort or delict was actionable per se in one country and only upon proof of damage in another, and damage occurred only in the latter while the rest of the train of events occurred in the former. If the "last event" rule is unacceptable, then so also, and for the same reasons, is a definition of the locus delicti in terms of the point at which a cause of action accrued.

4.86 We are, therefore, forced to the conclusion that it is impracticable to devise a general rule which would pinpoint the appropriate locus delicti in every case. This conclusion has been arrived at by others before us. For example, Kahn-Freund thought that trying to define the locus delicti was "a futile and singularly sterile problem",[434] and that concrete answers -

> " ... can be given only in the light of the nature of particular delicts ... and that they cannot be given either in general terms of 'act' or 'impact' or of schemes of cumulative or alternative systems."[435]

4.87 The only alternative seems to us to be that, except in cases of personal injury, death, damage to property, and any other cases for which special provision might be made (and which we discuss in Part V below), the court should determine the locus delicti pursuant to a general formula whereby the locus delicti would be defined as "the country where there occurred the most significant elements in the train of events", or in similar terms.

4.88 A different formula has been proposed by the Institute of International Law, which, in its resolution of 1969 (in the context of which Kahn-Freund made the observations quoted above), proposed that the locus delicti should be defined as follows:

> "a delict is regarded as having been committed at the place with which, in the light of all the facts connecting a delict with a given

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434 (1969) 53 I Ann. Inst. de droit international 469.

435 Ibid.

place (from the beginning of the delictual conduct to the infliction of the loss), the situation is most closely connected."[436]

4.89 We have reservations about the precise wording used in the Institute's resolution, since it may not co-exist happily with the idea of closest and most real connection which we propose for the general exception to the lex loci delicti rule discussed in the next section,[437] and the word "situation" appears somewhat vague, but the exact wording of the formula to be used would be for further consideration. We do, however, envisage that the train of events to be taken into account should include both the conduct and the results. The definition which we here propose would therefore not be equivalent to the "substance of the wrongdoing" test adopted by the English courts for jurisdictional purposes, which appears in practice to amount to "little more than a place of acting rule".[438]

(vi) Conclusions on the definition of the locus delicti in multi-state cases

4.90 Our provisional conclusions relating to the definition of the locus delicti in multi-state cases are, therefore, as follows:

(a) In cases of personal injury and damage to property, the locus delicti should be the country where the person or property was at the time the injury or damage was first inflicted;

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436 Article 2 of the Institute's resolution: (1969) 53 II Ann Inst. de droit international 386.

437 Paras. 4.118 - 4.123; and see Morse, p. 132.

438 Morse, p. 129. Winn J. in Cordova Land Co. Ltd. v. Victor Bros. Inc. [1966] 1 W.L.R. 793, 798, equates "the substance of the tort complained of" with "the substance of the wrong conduct alleged to be a tort". Ackner L.J. in Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248, 1252 refers to "the substantial wrongdoing". See also Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458; Buttigeig v. Universal Terminal & Stevedoring Corporation [1972] V.R. 626; Macgregor v. Application des Gaz [1976] Qd. R. 175; Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] 3 W.L.R. 492.

(b) In cases of death, the locus delicti should be the country where the deceased was when the fatal injury was first inflicted;

(c) In other cases, subject to any conclusions reached in Part V in connection with other types of tort and delict, the locus delicti should be the country where the most significant elements in the train of events occurred. (Comments will be invited in Part V upon whether other types of tort and delict should be specifically provided for.)

Comments are invited upon these conclusions.

4.91 We should, however, conclude by again putting the question of the definition of the locus delicti in multi-state cases into perspective. Our long discussion of this problem may tend to obscure the fact that although it is difficult to arrive at a wholly satisfactory definition of the locus delicti in multi-state cases, no definition at all will be necessary where the whole train of events occurs in a single country. This, we believe, will be the majority of cases. A precise definition of the locus delicti is offered in cases of personal injury, death, and damage to property, which will in practice cover most of the remaining cases. Only in relatively few cases, therefore, would it be necessary to fall back upon the more general formula. It should also be remembered that the problem of defining the locus delicti exists even under our present choice of law rules. The problem explored here is therefore not a new one, and is not peculiar to the new choice of law rule in tort and delict which we shall propose.

(c) The lex loci delicti may not always be appropriate

4.92 We turn now to a quite different question. We have alluded above[439] to the problems which may be caused by a simple but rigid choice of law rule; and the universal application, without exception, of the lex loci delicti would certainly be such a rule, albeit one with the

439 Paras. 4.16 - 4.18.

virtue of certainty. This rule formerly prevailed in the United States, where practical experience has shown that a rule which applies the lex loci delicti without exception is inadequate to cope with all the varied and unpredictable circumstances in which tort and delict cases arise. The courts in the United States first resorted to circumventing the lex loci delicti rule by devices such as re-classifying the issue raised in the particular case as belonging, not in the tort category, but in a different category, to which a different choice of law rule applied.[440] Following the case of Babcock v. Jackson[441] many states have now rejected the traditional rule[442] in favour of the quite different approaches which we have discussed above.[443]

4.93 The circumstances in which the application of the lex loci delicti produces results which "will begin to offend our common sense"[444] are difficult to define with accuracy. But it may at least be said that the policy reasons which support the application of the lex loci delicti become less weighty or disappear entirely when the occurrence and the parties are more closely connected with a country other than the locus delicti than they are with the locus delicti itself, and the expectations of the parties do not point in the direction of the lex loci delicti. As Kahn-Freund has put it -

> "[t]he locus delicti, that is the geographical environment of the act or conduct, is in a rapidly growing number of situations shown to be

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440 See para. 4.17 above.

441 12 N.Y. 2d 473, 191 N.E. 2d 279; [1963] 2 Lloyd's Rep. 286. See para. 4.94(2) below.

442 Estimates of the number of states which have abandoned or modified the lex loci delicti rule differ, but it appears that at least half of the states of the U.S.A. have done so: see Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772, 776.

443 Paras. 4.35 - 4.54.

444 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885; and The Conflict of Laws (3rd ed., 1984), p. 304.

'fortuitous', that is unconnected with the social environment of the parties, or of the relationship which exists between them."[445]

A trend away from a rigid lex loci delicti rule is in fact observable in many foreign jurisdictions,[446] and there seems to be a wide measure of agreement among modern commentators that although the lex loci delicti may be appropriate in many circumstances it is not appropriate in all.[447] In Boys v. Chaplin the House of Lords was unanimous in holding that the provisions of the lex loci delicti should not apply in the circumstances of that case.

4.94 Although it is difficult to define exhaustively the situations in which the application of the lex loci delicti is not called for on any ground of policy, and may therefore be inappropriate,[448] there would appear to be three main categories of such cases.

(1) The first case is what has been termed the "insulated environment" - that is, where the occurrence and the parties

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445 (1969) 53 I Ann. Inst. de droit international at p. 439. The possibility of a fortuitous locus delicti was adverted to in Boys v. Chaplin by Lord Hodson, Lord Wilberforce and Lord Pearson: [1971] A.C. 356 at pp. 380, 388, and 405 respectively. A note of caution should perhaps be sounded about the word "fortuitous", which is not always used so carefully as in the passage cited. The word is not always a very useful description, in the first place because in the case of an accident all of its elements (and not just some of them) could in some sense be described as "fortuitous", and in the second place because the description of a particular fact as "fortuitous" may result from assumptions which remain unstated or unexamined, and may also be used retrospectively to justify the choice of one law rather than another.

446 See Appendix.

447 For particular expressions of this view, see Anton, pp. 244-247; Dicey and Morris, pp. 932-935, 944-945; Kahn-Freund, passim; Morris, The Conflict of Laws (3rd ed., 1984), pp. 315-316; and Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881. Dr. Morris's solution to this problem is discussed below at paras. 4.126 ff.

448 See Dicey and Morris, pp. 932-935, 944-945; Kahn-Freund, pp. 63-128; Morse, passim; McGregor, "The international accident problem", (1970) 33 M.L.R. 1, 15-21.

are such that they do not interact with their geographical location. An example is a tort or delict committed wholly aboard a ship in territorial waters or an aircraft in flight: there is in such a case little obvious merit in applying the law of the littoral state or subjacent country.[449]

(2) The second case to some extent overlaps the first, and is more difficult to define, although probably more common: it is where the parties already have some connection with each other before the tort or delict occurs, in consequence of which it is reasonable that their mutual rights and liabilities be regulated according to some law other than that of the country where the tort or delict happened to occur. One such connection might be a contract between the parties, where the tort or delict is closely related to the contract, but a formal relationship such as this need not be postulated. For example, where a group of friends, all from Scotland, takes a motoring holiday in Europe, under a lex loci delicti rule the liability of the driver to his passengers for an accident would be successively regulated by the law of each different country they passed through, although it might be thought that there is no reason of policy which requires this, and that it would be more sensible that the law of Scotland should regulate their mutual liability. The lex loci delicti would, however, remain appropriate if a person outside the car were injured or his property damaged. An example of this sort of case is Babcock v. Jackson.[450] Mr and Mrs Jackson and their friend, Miss Babcock, all residents of the state of New York, went for

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449 We consider these cases at para. 5.77 below. Another example is given by Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885.

450 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep 286.

a weekend trip to Canada in the Jacksons' car. An accident occurred in Ontario in which Miss Babcock was injured. No other parties were involved. The lex loci delicti was clearly the law of Ontario, by which the owner or driver of a motor vehicle was not liable for injury to passengers, but in an action in New York the court held that the law of the state of New York should apply.

(3) A third type of case in which the application of the lex loci delicti may seem inappropriate, and one even more difficult to define, is where the parties have no pre-existing relationship, and the circumstances are not such that they could be said to be acting in an insulated environment, but nevertheless all, or all but a few, of the factors in the case show connections with a country which is not the locus delicti. Examples of this type of case might be McElroy v. McAllister, where every factor other than the place of the accident pointed to Scotland, or Boys v. Chaplin, where almost every factor in the case other than the place of the accident pointed to England, and where the House of Lords declined to apply the lex loci delicti in its guise as the second limb of the rule in Phillips v. Eyre.

4.95 We have, therefore, reached the provisional conclusion that the introduction of a strict lex loci delicti rule, without any exceptions, would not be a satisfactory way of reforming our present law. Comments are invited on this conclusion. Given, however, that in many circumstances the lex loci delicti is in fact the most appropriate law to apply, the question remains whether a basic lex loci delicti rule is capable of refinement in such a way as to permit the displacement, where desirable, of the lex loci delicti in favour of some other more appropriate law, while yet retaining for the whole choice of law rule a measure of certainty which is sufficiently high to be acceptable. As always, the dilemma is the correct balance between simplicity and refinement. Our view is that the lex loci delicti rule need not be abandoned entirely, as has been done in many states of the United States. What has been done in a

number of other jurisdictions[451] is to add to the basic lex loci delicti rule a number of exceptions, or rules of displacement, which in defined circumstances exclude the lex loci delicti, and apply some other law instead. Each exception is such that, so far as is possible, the law which it indicates would be more appropriate than the lex loci delicti. It is probably not feasible, within acceptable limits of certainty, to achieve in every case the application of a perfectly appropriate law. A "lex loci delicti with exceptions" approach, however, would seek to refine the basic lex loci delicti rule to the extent that appropriate results were achieved in an acceptably high proportion of cases.

4.96 There appear to be two ways in which exceptions to a basic lex loci delicti rule could be formulated. One way would be to try to base exceptions on connecting factors other than the locus delicti which, if present in a particular case, would point to a country whose system of law would be more appropriate than the lex loci delicti, while leaving the lex loci delicti to apply in the absence of such connecting factors. We discuss some possible exceptions formulated in this way in the next following paragraphs, and we refer to an exception of this type as a "specific exception". The other way appears to be to formulate a general exception which would not depend on any particular connecting factor but which would permit the lex loci delicti to be departed from in appropriate circumstances. We discuss such an exception at paras. 4.118 - 4.123.

(i) Possible specific exceptions to the application of the lex loci delicti

4.97 A preliminary point, which is relevant to all the specific exceptions which we shall discuss, is the question of the circumstances in which the exception should be triggered. There are two possibilities:

(1) the exception might operate in all the cases which fell within its boundaries, in the expectation that in a sufficiently large

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451 See Appendix.

majority of such cases the exception would result in the application of a more appropriate law than the lex loci delicti; or

(2) the exception might operate, not in all the cases which fell within its boundaries, but only in those where it would in fact result in the application of a more appropriate law than the lex loci delicti.

Our discussion of the specific exceptions assumes that they would be of the first type. We return to the second possibility below.[452]

(a) Common personal law exception

4.98 A "common personal law" exception would operate to apply the law of common nationality or habitual residence (if there was one), instead of the lex loci delicti, and is to be found in a number of the foreign choice of law rules which we have surveyed for the purposes of this paper.[453] It is also contained in the Swiss proposals,[454] and has attracted academic support.[455]

4.99 If such an exception were to be adopted, it would in our view be unacceptable to define the common personal law in terms of nationality. A nationality criterion would not work within the United Kingdom, and complications would arise if any party was stateless or had

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452 Para. 4.117.

453 In particular, the Federal Republic of Germany, East Germany, Poland and Portugal: see Appendix. The Private International Law Committee of the Civil Code Revision Office of Quebec has suggested that the basic choice of law rule in tort and delict cases should be that the law of the claimant's habitual residence should apply: see Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 647-648; and Morse, p. 344.

454 Article 129(1): see Appendix.

455 For example, Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98. See also Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772.

dual nationality. Although nationality no doubt coincides in many cases with habitual residence, there are many cases where it does not, and in such cases habitual residence seems to us more likely to provide a law which has a closer connection with the parties and the occurrence.

4.100 One practical disadvantage of any kind of "habitual residence" exception is that it may be difficult for one party to ascertain the habitual residence of the other: in such circumstances neither party would be sure of the applicable law. This is not, perhaps, sufficiently likely to occur as to be a serious objection to a common personal law exception; but we also have further reservations about the application of the law of the place of common habitual residence.

4.101 A common habitual residence exception could be supported on two grounds. One is that the existence of a common habitual residence is in itself sufficient to justify applying the law of that country, irrespective of whether the parties had a pre-existing connection with each other, and irrespective of the circumstances of the tort or delict. However, it seems to us that the fact that the parties to a tort or delict happen to share a habitual residence might well be just as "fortuitous" as the locus delicti itself, and the application of its law entirely contrary to their expectations. It seems likely to us that any factor which links the parties and the occurrence to a greater degree than the locus delicti does, and which justifies the displacement of the lex loci delicti, will arise less from the existence of a common habitual residence as such than from (for example) the fact that the parties were jointly engaged upon a common enterprise, or were linked by some pre-existing relationship. It therefore appears to us that the application of the law of the parties' common habitual residence as such cannot be justified on grounds of principle.

4.102 The second ground upon which a common habitual residence exception could be supported is that a common habitual residence may frequently suggest that there is a link between the parties which would render the locus delicti comparatively insignificant. This could justify the use of a common habitual residence exception on the pragmatic ground

that it would in practice result, in a sufficiently large proportion of cases, in the application of a more appropriate law than the lex loci delicti. It must be admitted that of the three specific exceptions which we discuss here and in the following paragraphs, only the common habitual residence exception could have achieved the application of English law in Boys v. Chaplin, or Scots law in McElroy v. McAllister; and the use of such an exception in a number of foreign systems may indicate that it produces acceptable results in practice. However, we are not sufficiently confident of this to conclude that such an exception should definitely be adopted. Comments are invited.

(b) Pre-existing relationship exception

4.103 We turn now to the possibility of an exception which would apply where there was a pre-existing relationship between the parties. Where there was such a relationship, the lex loci delicti would not apply; instead, the law governing or appropriate to the relationship would apply. Two questions arise in relation to such an exception:

(1) What kind of relationship should trigger the exception?

(2) Will the existence of such a relationship indicate in principle or in practice a system of law more appropriate than the lex loci delicti?

4.104 As to the type of relationship, there would appear to be a choice between, on the one hand, confining the qualifying relationships to specific legal ones, and, on the other hand, allowing any relationship to qualify, even if merely social. The latter possibility clearly raises formidable problems of definition, which in our view would be incapable of a priori resolution. In the absence of definition, however, a pre-existing relationship exception appears to us to have no advantage over the general exception which we discuss below.[456]

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456 Paras. 4.118 - 4.123.

4.105 A pre-existing relationship exception would therefore, in our view, have to be based on a legal relationship. However, it does not seem to us that all such relationships can qualify. It would seem to be manifestly absurd that a pre-existing legal relationship between the parties should always be sufficient to justify the displacement of the lex loci delicti, and the application instead of the law governing the pre-existing legal relationship, if the relationship in question was unconnected with the tort or delict. The mere existence of a pre-existing legal relationship could, again, be just as "fortuitous" as the locus delicti. For example, the most obvious case of a pre-existing legal relationship is perhaps a contract, but it cannot in our view be right that a tort or delict which was entirely unconnected with the contract but which was committed by one contracting party against the other should be decided by the proper law of the contract as such. (There might be other reasons for applying the law which happened also to be the proper law of the contract, but the mere existence of the contract should not of itself be conclusive.) The problem would become incapable of solution if there were two contracts between the parties, governed by different proper laws. The existence of a special legal relationship, such as (for example) those of trustee and beneficiary, lessor and lessee, solicitor and client, or even husband and wife, does not in itself seem to us to give rise to a case for displacing the lex loci delicti.

4.106 What is therefore necessary, if such an exception is to work, is a relevant pre-existing legal relationship. This again introduces a problem of definition. It does not seem to us practicable to enumerate in advance what pre-existing relationships would be relevant. A decision as to what was or was not relevant would, in the final analysis, have to be left to the court. This being so, a "pre-existing relationship" exception, even if confined to legal relationships, does not in fact seem to us to have any advantage over a more general exception such as that discussed below.[457]

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457 Paras. 4.118 - 4.123.

4.107 However, one way of confining such an exception would be to adopt a provision such as that contained in the Swiss proposals, namely that -

> "...where a wrongful act constitutes an infringement of a pre-existing legal relationship between wrongdoer and victim, a claim based upon that act is governed by the law applicable to that legal relationship."[458]

It is thus not enough that there be "une relation quelconque avec un rapport préexistant":[459] there must be not only a pre-existing legal relationship, but also an act which is in breach of that relationship. The obvious case is of a tort or delict which is also a breach of contract.

4.108 It is not entirely clear to us whether the Swiss provision is intended simply to operate as a choice of law rule whereby the claim in tort or delict and the pre-existing legal relationship would be governed by the law of the same country, or whether it is intended to prevent the claimant from relying on any claim in tort or delict, and to require him to rely on any remedy arising out of the pre-existing legal relationship. We do not believe the latter would be practicable in the United Kingdom. Although, on the other hand, there is clearly an argument based on convenience in favour of deciding a claim in tort or delict and a claim in (for example) contract by the law of the same country, if both claims spring from the same incident, there does not seem to us to be any reason of principle why the claimant (or indeed the wrongdoer) should be confined to the tort or delict rules of the country whose law also governed the contract. The tort or delict may have no connection at all with the country of the proper law of the contract. In many cases such an exception would also raise the preliminary issue of whether or not the alleged tort or delict was, in fact, a breach of contract; and the law applicable to the tort or delict could not be determined until that issue was disposed of. Further, the question of definition remains, for there

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458 Article 129(3). See Appendix.

459 Report accompanying the Swiss proposals, section 284.222, p. 157.

are relationships which do not seem to fit within this type of exception: for example, would the relationship between husband and wife count as a pre-existing legal relationship, and what would constitute a breach of it? Finally, an exception restricted in this way would in any event, in our view, cover only a small proportion of the cases in which it would be justifiable to displace the lex loci delicti.

4.109 We have for these reasons reached the provisional conclusion that a "pre-existing relationship" exception would either have to be so confined that it would be unsatisfactory and would have very little application, or that (if not so confined) it would have no advantage over the general exception which we discuss below.[460]

(c) Common enterprise exception

4.110 The common enterprise exception is more subtle than the common habitual residence exception, but would be one way of dealing with some of the "special relationship" or "insulated environment" cases to which attention has already been drawn. We are not, however, aware of provision for such an exception in the systems of foreign law which we have surveyed.

4.111 The exception would apply where a claim arose from an injury or damage which occurred in the course of a common enterprise centred in a country other than the locus delicti. In such a case the lex loci delicti would not apply: instead, the law of the country where the common enterprise was centred would govern the rights inter se of those participating in the exercise. The exception is thus aimed at some of the very situations which give rise to unacceptable results under a strict lex loci delicti rule: namely the "fortuitous" locus delicti, where neither the occurrence nor the parties to the action have any significant connection with the locus delicti, but where there is nevertheless the unifying factor described as a "common enterprise", not necessarily amounting to a pre-

460 Paras. 4.118 - 4.123.

existing legal relationship (although such a relationship would not be inconsistent with a common enterprise exception).

4.112 Clearly the idea of a common enterprise must, if it is to represent a factor which unites the parties more than the locus delicti does, apply only to cases where the parties are carrying on some activity with a common purpose which is being pursued together, not separately. (It could not be said, for example, except in the loosest sense, that the passengers in an aircraft on a scheduled flight were engaged in a "common enterprise".) Examples of a "common enterprise" might be a motoring trip[461] or any excursion undertaken in co-operation; a commercial joint venture; or a joint publication (where both the authors and the publisher could be said to be engaged in a common enterprise). However, although examples may be provided, the main problem with an exception like this is again one of definition: what is to be included within the notion of a "common enterprise", and (perhaps more difficult) how is the place where it is centred to be discovered? While it is easy to see that two or more people who are (for example) jointly engaged upon some expedition, or in writing a book, are engaged in a common enterprise, and easy to accept that their relations inter se should be governed by the law of the country which gave birth to their relationship, it is not quite so easy to define where their enterprise is centred if it includes more than one foreign element. If two Englishmen fly to Switzerland, and there hire a car and drive into France to visit a business acquaintance but have an accident in which one of them is injured, what is their common enterprise, and where is it centred? What of a hitch-hiker picked up by a family touring on the continent: is he part of a common enterprise, and, if so, is it the same one as that of the family, or a different one? It is clear that a common enterprise exception would raise formidable problems of definition, and it appears to us that with this exception, as with the pre-existing relationship exception discussed immediately above, the absence of such

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461 As in Babcock v. Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep. 286. See para. 4.94(2) above.

definition would seriously diminish its advantages over the general exception discussed below.[462]

4.113 The second problem with a common enterprise exception has also been encountered before in connection with the other exceptions which we have considered. The mere existence of a common enterprise could be just as "fortuitous" as the locus delicti: a tort or delict could have little or no connection with the common enterprise upon which the parties were engaged. It would therefore be necessary either to confine the application of the exception to cases where the tort or delict was connected with the common enterprise (and we are not confident that the relevant connection could be satisfactorily defined), or to make the assumption that the existence of a common enterprise would in an acceptably high proportion of cases coincide with circumstances in which the displacement of the lex loci delicti was appropriate. We are not confident that this assumption would be justified, and there may also be cases where displacement of the lex loci delicti would be appropriate even though there was no common enterprise.

4.114 Although we believe that the notion of a common enterprise represents a more relevant and principled connecting factor than those embodied in the other specific exceptions which we have discussed above, and that given adequate definition it would in many cases indicate a law more appropriate than the lex loci delicti, our provisional conclusion is that such an exception cannot be defined in terms which would give it any advantage over the general exception which we discuss below.[463]

(ii) Our provisional conclusions on specific exceptions

4.115 The foregoing discussion highlights the problem which is raised by any attempt to introduce strict rules into the field of choice of law in tort and delict. As we have seen, the lex loci delicti has a strong prima

462 Paras. 4.118 - 4.123.

463 Paras. 4.118 - 4.123.

facie claim to application, but a lex loci delicti rule by itself has been shown to be inadequate. Attempts to refine it by the introduction of well-defined exceptions seem to us, however, to run up against the paradoxical difficulty that no single specific exception is wide enough, in that each leaves to the general lex loci delicti rule some cases where the general rule should be displaced; and each exception is simultaneously too wide, in that it displaces the general rule in some cases where it should not.

4.116 The first aspect of this difficulty could in theory be met by adopting, not just one specific exception, but a series of them. There would probably be rather few cases where none of the proposed exceptions applied and yet where to apply the lex loci delicti would be inappropriate. However, although this may make the inclusion of all of the exceptions (and not just one or some of them) seem attractive, a new problem would be created: the possibility of more than one exception applying, each pointing to a different choice of law. The only way to resolve this problem would be to arrange the exceptions in order of priority, but it is hard to see on what basis this could be done, and the result would be a very complex set of statutory rules. We do not, therefore, find this solution attractive, but comments are invited.

4.117 The second aspect of the difficulty (namely that some cases may fall within the boundaries of a specific exception in circumstances where it would not be appropriate to displace the lex loci delicti) could be met by making the specific exceptions non-mandatory: in other words, formulating them so that the lex loci delicti would be displaced in favour of the law indicated by the exception only if it was in fact appropriate to do so in the circumstances of the case. Our provisional conclusion is that specific exceptions of this type would have, on balance, no advantage over the general exception which we discuss next.

(iii) A general exception

4.118 The alternative to a specific exception, or a series of such exceptions, appears to us to be a general exception whose operation would not be confined to any particular set of circumstances. The precise formulation of such an exception would be for further consideration, but we provisionally propose an exception which would permit the displacement of the lex loci delicti in favour of the law of the place with which not only the occurrence but also the parties had, at the time of the occurrence, the "closest and most real connection".[464] There would therefore be no requirement of common habitual residence, or of a pre-existing relationship, or of a common enterprise: the only test would be that the occurrence and the parties had their closest and most real connection with a country other than the locus delicti. In view of the difficulties of definition which we perceive in connection with the specific exceptions discussed above, we have reached the provisional conclusion that it would not be practicable to define further the concept of "closest and most real connection".

4.119 A general exception has been included in a number of schemes for choice of law in tort and delict, including the Austrian and the Swiss.[465] It was also included in Articles 10 and 13 of the E.E.C. Draft Convention,[466] and in Article 14(2) of the proposed Benelux Uniform Law relating to Private International Law, originally promulgated in 1951 and revised (without change in the tort and delict provisions) in 1969. Although the Benelux Uniform Law never entered into force as such, it

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464 This test is similar to that used in the Restatement Second, which we discuss below: see paras. 4.136 - 4.139. It is also analogous to the formula defining the proper law of a contract.

465 See Appendix. The Swiss provision is not confined to tort and delict.

466 See Appendix.

has been adopted by courts in the Netherlands[467] and in Luxembourg.[468] The scheme of the United States Restatement Second is different, but the sections dealing with particular torts and issues also contain a presumption which is subject to displacement by a test similar to the general exception here proposed.[469]

4.120 The advantage of a general exception is that it would permit the displacement of the lex loci delicti in appropriate cases, without limiting either the systems of law in favour of which the lex loci delicti could be displaced, or the circumstances in which such displacement could take place. Any system of specific exceptions such as those we have discussed above would limit both of these things, and would also raise problems of definition which would be absent from a general exception. The circumstances which give rise to tort and delict cases are so varied that a general exception appears to us to be best adapted to cope with any case which may arise.

4.121 One possible disadvantage of a general exception is that a tendency may develop for courts to apply the lex fori where possible, by resorting to the general exception in inappropriate cases; but the major disadvantage is clearly the uncertainty inherent in a general exception. Here again the tension between certainty and refinement becomes apparent. The uncertainty would be greater than for specific exceptions of mandatory application. It would also be slightly greater than for

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467 De Beer v. De Hondt, Court of Appeal, The Hague, 16.6 1955, (1956) 3 Nederlands Tijdschrift v.i.r. 290. Cf. Court of Appeal, The Hague, 28.12.1934, N.J. 1937, No. 108, which is to the opposite effect. See Appendix.

468 Luxembourg Cour Supérieure de justice, 16.6.1970, (1970) 21 Pasicrisie Luxembourgeoise 347.

469 We discuss the Restatement Second below at paras. 4.136 - 4.139.

specific exceptions which were not of mandatory application, since its potential field of application would be wider, but in our view there would be little point in introducing such exceptions: if the uncertainty inherent in specific exceptions not of mandatory application is acceptable, then so also (in our view) is that inherent in a general exception. The main choice, in our view, lies on the one hand between one or more specific exceptions of mandatory application, and on the other hand a general exception. For the reasons outlined we provisionally favour a general exception. Comments are invited.

4.122 However, we have also reached the provisional view that a general exception which was not confined in its operation would render our choice of law rule as a whole unacceptably uncertain. The fact that it is difficult to catalogue the circumstances in which the lex loci delicti should be departed from does not, in our view, justify an exception which would in practice permit the application of the lex loci delicti to become discretionary, or departure from it arbitrary; as we have said, the lex loci delict has a strong prima facie claim to application. It therefore seems to us that a threshold or trigger requirement should be built in to any general exception, which would serve to prevent departure from the lex loci delicti in the absence of strong grounds for doing so. It would thus be insufficient for displacement of the lex loci delicti that the parties and the occurrence merely had a closer and more real connection with another country than they did with the locus delicti;[470] a further requirement would be necessary. Comments are invited upon whether, in principle, such a threshold requirement should be provided for.

4.123 The formulation of such further requirement is for consideration. It would, for example, be possible to provide, in increasing order of stringency, that displacement of the lex loci delicti would not be permitted unless -

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470 This seems, however, to be sufficient for the Austrian provisions, article 13 of the E.E.C. Draft Convention, and article 14(2) of the proposed Benelux Uniform Law. See Appendix.

(a) the occurrence and the parties had only **an insignificant connection** with the locus delicti, and also a substantial connection with another country;[471] or, alternatively,

(b) the occurrence and the parties had **no connection at all** with the locus delicti apart from the fact that the tort or delict was committed there, but did have a substantial connection with another country.

We seek views on the stringency of any threshold requirement which would be incorporated into the general exception. Our tentative view is that to require the total absence of connection with the locus delicti apart from the commission there of the tort or delict would go too far, and that an acceptable balance between certainty and flexibility would be achieved by permitting the lex loci delicti to be displaced in favour of the law of the country with which the parties had the closest and most real connection, provided their connection with the locus delicti was insignificant and their connection with the other country substantial, as in alternative (a) above. Comments are invited.

(iv) A possible cumulative scheme

4.124 We have so far discussed the specific exceptions and the general exception as if they were mutually exclusive. However, a possible alternative scheme would include both types of exception, but would make them cumulative. In other words, the lex loci delicti would provide the basic rule, but would be automatically displaced in favour of such system of law as was indicated by any applicable specific exception. (If more than one specific exception were included, it would be necessary to arrange them in order of precedence. As we have already mentioned, we find it hard to see on what basis this could be done.) The general exception would then apply as a residual or "safety-net" provision; it would be capable of displacing the lex loci delicti if no specific exception applied, and would also be capable of displacing the system of law indicated by any applicable specific exception. In both cases the

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471 As in article 14 of the Swiss proposals and perhaps also article 10 of the E.E.C. Draft Convention: see Appendix.

displacement, subject to any threshold requirement, would be in favour of the law of the country which had the closest and most real connection with the occurrence and the parties. Under such a scheme the general exception should fall to be used only rarely. This cumulative scheme is the one which is adopted by the Swiss proposals.[472] Our provisional view, however, is that such a statutory scheme would be undesirably complex, and should not be adopted in the United Kingdom. Comments are invited.

(v) The relationship between the general exception and the definition of the locus delicti in multi-state cases not involving personal injury, death, or damage to property

4.125 It seems to us that the identification of the locus delicti in a multi-state case should be separate from the question whether the lex loci delicti (as thus identified) should be departed from in the circumstances of the particular case, in accordance with an exception to the lex loci delicti rule. The identification of the locus delicti in a multi-state case should therefore take into account only the particular distribution of the elements in the train of events, and no account should be taken of any other factor, such as the characteristics of the parties and their relationship. Factors such as these should, we believe, be relevant only to any exception to the lex loci delicti rule. However, in view of the similarity of the formulae which we propose for the general exception to the operation of the lex loci delicti rule, and for the definition of the locus delicti itself in a multi-state case not involving personal injury, death, or damage to property,[473] it must be conceded that if our provisional proposals were accepted, the operation of the definition of the locus delicti and the operation of the general exception (although in theory separate) might in practice tend to merge in some multi-state cases. We do not believe that this would in fact give rise to any problem, or that it should in every multi-state case be compulsory to separate rigidly the definition of the locus delicti and the operation of the general exception.

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472 Article 14. See Appendix.

473 See above, paras. 4.83 - 4.89.

4. The "proper law of the tort" and the Restatement Second

4.126 We now turn away from the lex loci delicti rule and consider, finally, a completely different option for reforming our choice of law rule in tort and delict, namely the application of the "proper law of the tort". Our private international law has for many years provided for a contract to be governed by its "proper law" - that is, in the absence of choice by the parties, the system of law with which the contract had the closest and most real connection at the time it was made. The idea that liability in tort and delict should be governed by the proper law of the tort, analogous in conception to the proper law of a contract, was developed by Dr. J.H.C. Morris,[474] who expressed the view that -

> "... it seems unlikely that a single mechanical formula will produce satisfactory results when applied to all kinds of torts and all kinds of issues."[475]

4.127 The preceding discussion of other options for reform, from which it is clear to us that any mechanical formula will have to be qualified by exceptions, seems amply to demonstrate the truth of this proposition. Dr. Morris's suggestion was, therefore, that -

> "[a] proper law approach, intelligently applied, would furnish a much-needed flexibility. It may be conceded that in many, perhaps most, situations there would be no need to look beyond the law of the place of wrong, so long as there is no doubt where that place is. But we ought to have a conflict rule broad and flexible enough to take care of exceptional situations as well as the more normal ones, or else we must formulate an entirely new rule to cope with the exceptional situations. Otherwise the results will begin to offend our common sense."[476]

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474 The idea was aired in a comment on McElroy v. McAllister 1949 S.C. 110 which appeared in (1949) 12 M.L.R. 248; and more fully developed in "The proper law of a tort", (1951) 64 Harv. L.R. 881. See also Dicey and Morris, pp. 932-936; Morris, The Conflict of Laws (3rd ed., 1984), pp. 304-305.

475 Morris, The Conflict of Laws (3rd ed., 1984), p. 304.

476 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 884-885.

The essence of his proposal is that -

> "[i]f we adopt the proper law of the tort, we can at least choose the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us."[477]

4.128 Dr. Morris's approach to finding this law involves taking into account a number of factors apart from the place where the tort or delict occurred (if there can be said to be such a place), such as the social "environment"[478] of the tort or delict, the extent to which the tort or delict was connected with the place where it occurred, the particular issue involved, and the purposes of the laws in conflict and the interests of the states involved. The proper law is thus found by taking into account both geographical and other indicators.

4.129 The proper law approach has been widely discussed and an approach akin to it appears to have been adopted in Norway.[479] We are however not aware that it has been adopted as such as the basic choice of law rule in any other country, although its adoption has been suggested in Canada,[480] where a Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada had by 1963 been led -

> "... to accept the arguments of Professor Morris, first, that a proper law principle, intelligently applied in the area of foreign torts, would furnish flexibility where it is much needed, and second, that it

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477 Ibid., 888.

478 Dicey and Morris, p. 934.

479 Transactions of the 11th session of the Hague Conference on Private International Law (Traffic Accidents Convention), Vol. III (1970), pp. 47-48.

480 Draft Foreign Torts Act (1966). Text and discussion in Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 643-646 and in Morse, pp. 325-326. See Report of Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1966), p. 62.

would facilitate a more rational means of solving the foreign torts problem than does either the rule in Phillips v. Eyre or the place of wrong rule."[481]

The influential United States Restatement Second, which we discuss below,[482] can also be seen as a particular manifestation of the proper law approach; and in England and Wales it has been approved by Lord Denning.[483]

4.130 Flexibility is the great attraction of a simple choice of law rule which would apply the law which had "the most significant connection with the chain of acts and consequences".[484] This simple rule would allow a judge to apply the law which appeared most appropriate in the circumstances before him. It would be possible to concentrate on the particular facts; the temptation to re-classify an issue so as to avoid treating it as an issue in tort or delict would be reduced;[485] and such an approach would also wholly avoid the exceptions which, as we have seen above, appear to us to be a necessary part of any choice of law system based upon a more closely defined general rule. Further, the proper law approach entirely does away with the problems raised in trying to define a locus delicti, since it does not assume that there is a locus delicti. The proper law approach is also attractive in that it seeks to apply the most appropriate law in every case.

4.131 However, the attractions of a bare proper law rule are purchased at a high price. The great disadvantage of the proper law approach on its own is its uncertainty. The idea of the proper law of the

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481 Read, "What Should be the Law in Canada Governing Conflict of Laws in Torts?" (1968) 1 Can. Leg. Stud. 277, 289.

482 Paras. 4.136 - 4.139.

483 Boys v. Chaplin [1968] 2 Q.B. 1, 26 (C.A.); Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176 (C.A.).

484 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 888.

485 See above, para. 4.17.

tort was almost at once criticised on this ground;[486] Ehrenzweig has spoken of "the 'give-it-up formulas' of the 'proper law' ";[487] and it was on this ground that the House of Lords in Boys v. Chaplin were worried about the proper law approach.[488] We make proposals which attempt to deal with this point below.[489]

4.132 Dr. Morris himself has refuted the charge of unacceptable uncertainty by pointing to the field of contract, where the demands of certainty are much more stringent than in the field of tort and delict, and where our private international law has developed the idea of the proper law with apparently perfectly acceptable results.[490] There are, however, two points to be made here. The first is that the validity of this comparison with the field of contract appears to us to be doubtful to the extent that the parties to a contract may expressly choose the governing law, even though in many instances they do not.[491] Where they do not, there is nevertheless a principle which may be used implicitly in the search for the proper law of a contract, namely the intentions to be imputed to the parties. No such principle is available in the field of tort and delict, where a proper law would have to be chosen on the basis of the circumstances alone. Secondly, it is also necessary to bear in mind that our reformed choice of law rule is intended to be cast from the outset in statutory form, unlike the choice of law rule in contract, which grew up

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486 Gow, "Delict and private international law", (1949) 65 L.Q.R. 313, 316.

487 Ehrenzweig, Private International Law, General Part (1967), p. 72.

488 [1971] A.C. 356, 377G - 378A per Lord Hodson, 381C - D per Lord Guest, 383G per Lord Donovan, 391B - E per Lord Wilberforce, 405G - H per Lord Pearson.

489 Paras. 4.136 - 4.142.

490 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 883, 894; and The Conflict of Laws (3rd ed., 1984), p. 305.

491 Boys v. Chaplin [1971] A.C. 356, 377-378 per Lord Hodson.

over the years through a gradual accretion of judicial decisions. Although the proper law of the contract approach has, in effect, now been reduced to writing and incorporated into a convention,[492] a proper law of the tort or delict rule would not have the benefit of the same background, and although such a rule might in theory have grown up in the same way as the proper law of the contract, it did not in fact do so. A statutory rule would, we believe, have to contain more than a simple assertion that the proper law of the tort or delict was to apply: such a rule would merely be a statement of the desired result and would provide no guidance about how to reach it. That guidance would in our view have to come from a statutory framework, and the further question therefore arises of what form this statutory framework should take and how far it should extend.

4.133 Our provisional conclusion is, therefore, that a pure proper law rule, without elaboration, would be unacceptably uncertain, and unsuitable for statutory reform. Comments are invited on this view. The question remains whether a proper law rule could be adapted in order to make it acceptable. There appear to us to be two ways in which this might be done.

4.134 The first way would be to add to the basic proper law rule a list of factors, stated in general terms and without reference to any particular type of tort or delict, which would be taken into account when identifying the proper law in any particular case. In the field of contract, an analogous approach has been adopted in the United Kingdom in relation to the concept of reasonableness provided for in section 11 (for England and Wales and for Northern Ireland) and section 24 (for Scotland) of the Unfair Contract Terms Act 1977. Schedule 2 to that Act provides

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492 E.E.C. Convention on the Law Applicable to Contractual Obligations (1980), (1982) U.K. Treaty Series Miscellaneous No. 5, Cmnd. 8489. The United Kingdom has signed, but not yet ratified, this convention.

guidelines for the application of the reasonableness test by listing five "matters to which regard is to be had in particular" when determining whether a contract term satisfies the requirement of reasonableness. In Canada, the draft Foreign Torts Act[493] proposed in 1966 by a Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada, which provides that "the local law of the state which has the most substantial connection with the occurrence and with the parties"[494] should apply, lists four "important contacts"[495] for a court to consider in determining whether a state has such a substantial connection.

4.135 We have, however, reached the provisional conclusion that the addition to the basic proper law rule of a list of such factors or guidelines would not of itself be sufficient to introduce into the basic rule an acceptable degree of certainty. It would be desirable to arrange the factors to be taken into account in order of importance, but we can see no principled way in which this could be done, since the importance which should be attached to each factor would differ from case to case. Further, a mere catalogue of the factors present would not necessarily point in the direction of any particular system of law.

4.136 A different way of building on the proper law principle would be to provide presumptions as to the applicable law for certain defined types of tort or delict. A scheme which combines what is effectively a basic proper law rule with a series of presumptions is contained in the United States Restatement Second, which, indeed, has the support of

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493 See para. 4.129 above.

494 Clause 1: see n. 480 above.

495 Clause 2: see n. 480 above.

Dr. Morris himself.[496] This we regard as a more promising approach, and the Restatement has been relied upon in a number of United States decisions.[497] The Restatement Second covers the whole of the conflict of laws, but as far as tort and delict is concerned it in effect seeks to apply the proper law, but provides a more detailed set of rules by which to find the proper law in a particular case. It differs, however, from a proper law rule in that it starts off with a set of basic general principles: these apply throughout, and not only to the provisions on tort and delict.[498] These general choice of law principles are, in section 145, incorporated into the general choice of law rule for torts and delicts, which is -

> "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant

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496 Morris, book review, (1973) 21 Am. J. Comp. L. 322, and see The Conflict of Laws (3rd ed., 1984), p. 305. On the Restatement generally in this context, see Morse, pp. 259-263.

497 For example, Ingersoll v. Klein 46 Ill. 2d 242, 262 N.E. 2d 593 (1970); Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L. 422 F. Supp. 405 (1976); Crim v. International Harvester Co. 646 F. 2d 161 (1981). Such an approach has been suggested in Australia: Pryles, "The remission of High Court actions to subordinate courts and the law governing torts", (1984) 10 Syd. L.R. 352, 377-378, following Pozniak v. Smith (1982) 56 A.L.J.R. 707, 714 per Mason J.

498 These resemble the "choice-influencing considerations" which are discussed above at paras. 4.51 - 4.54. The basic general principles are laid down in section 6 and are as follows:

> "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied".

relationship to the occurrence and the parties under the principles stated in [section] 6.

(2) Contacts to be taken into account in applying the principles of [section] 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

4.137 The Restatement Second then goes on from this basic choice of law rule in tort and delict to provide more specifically for particular torts and delicts, or issues in tort and delict. For example, section 146 provides:

"In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

Further detailed rules are provided, covering different types of tort or issue.

4.138 The approach of the Restatement Second has not escaped criticism. As with a basic proper law rule, the most serious charge against the Restatement is, of course, that of uncertainty,[499] since the general rule of section 145 contains no indication of how the relative importance of the contacts there listed is to be assessed, nor any

499 See, e.g. Ehrenzweig, (1965) 113 U. Pa. L.R. 1230, 1243 and (1968) 17 I.C.L.Q. 1, 8.

indication of what other contacts might be relevant; and the same is true of the list of choice of law principles in section 6. However, in our view, the Restatement answers this criticism by providing further, more precise, rules for individual torts and delicts and issues in tort and delict, while retaining throughout the "most significant relationship" test as the basic rule.

4.139 We have reservations about the usefulness of the general principles contained in section 6 of the Restatement; and the Restatement provides a set of rules which we believe may be rather too detailed for our purposes.[500] We have nevertheless reached the provisional conclusion that a proper law approach combined with presumptions as to the proper law for particular types of tort and delict represents a possible option for reform of our choice of law rule.

4.140 The basic rule which we provisionally propose would be that the applicable law should be that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection. To this basic rule would be added a number of rebuttable presumptions. The question of what those presumptions should be has, we believe, already been partly answered in another context above. In our discussion of the definition of the locus delicti for the purposes of a choice of law rule based on the lex loci delicti,[501] we reached the view that there were strong reasons of policy for applying, in a case of personal injury or damage to property, the law of the country where the person was when he was injured or the property was when it was damaged; and, in a case of death, the law of the country

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500 Hancock, writing in the Canadian context, thought inter alia that the Restatement was "far too elaborate and detailed for Canadian purposes at the present time": Report of Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity on Legislation in Canada (1966), p. 60.

501 Paras. 4.61 - 4.91 above.

where the fatal injury was received.[502] These reasons of policy are not altered merely because of a different formulation of the general rule. Accordingly, our proposal is that the following presumptions should be added to the basic proper law rule: the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary were shown, be presumed to be -

(1) in a case of personal injury or damage to property, the country where the person was when he was injured or the property was when it was damaged;

(2) in a case of death, the country where the deceased was when he was fatally injured.

These presumptions would, of course, not be confined to multi-state cases: they would apply in all cases; and in practice would, we believe, leave few torts and delicts to be dealt with according to the general proper law rule. We consider below, in Part V, whether any further presumptions should be added to the list, but we here invite comment on the proper law approach with presumptions which we have proposed.

4.141 In connection with the proposed presumptions, a further question arises. It will be recalled that, in the context of the "general exception" to our proposed lex loci delicti choice of law rule, we discussed whether there should be a threshold which would require to be surmounted before it was permissible to depart from the lex loci delicti rule and apply the general exception instead.[503] A similar question arises here: should there be a threshold which would require to be surmounted before it was permissible to depart from any presumption? In other words, how easy should it be to rebut the presumptions? Our provisional view, upon which comments are invited, is that there would be little point in providing presumptions if they were very easily rebutted, and this would also reduce

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502 Paras. 4.78 - 4.82 above.

503 Paras. 4.122 - 4.123 above.

the degree of certainty of the proper law scheme as a whole. We therefore propose that a threshold requirement should be introduced. The height of this threshold is for consideration, and comments are invited. We considered this question also in the context of the lex loci delicti option, and there reached the view that the threshold should at least insist that the parties and the occurrence had an insignificant connection with the locus delicti, and a substantial connection with another country.[504] Our provisional view is that the corresponding threshold for our proper law proposals should be at least as high: that the presumptions should not be departed from unless the parties and the occurrence have an insignificant connection with the country indicated by the presumption, and a substantial connection with another country. Comments are invited.

4.142 Our provisional conclusions relating to the proper law option are, therefore, that a proper law rule, combined with a number of presumptions (which would be rebuttable, although not easily so) as to the place with which the occurrence and the parties had the closest and most real connection, represents a possible option for reforming our choice of law rule in tort and delict.

D. SUMMARY

4.143 In this Part of our consultation paper we have considered eight different options for reforming our present choice of law rule in tort and delict. We reached the provisional conclusion that six of them would not be acceptable. These were:

(i) the lex fori alone [discussed at paras. 4.24 - 4.29]

(ii) the lex fori with exceptions [discussed at paras. 4.30 - 4.34]

(iii) governmental interest analysis [discussed at paras. 4.36 - 4.45]

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504 Para. 4.123 above.

(iv) principles of preference [discussed at paras. 4.46 - 4.50]

(v) choice influencing considerations [discussed at paras. 4.51 - 4.54]

(vi) the lex loci delicti alone [discussed at paras. 4.55 - 4.60, 4.92 - 4.95]

We invited comments on our views on these options.

4.144 Either of the remaining two options could, we provisionally concluded, provide a satisfactory reformed choice of law rule in tort and delict. We considered these options primarily in connection with personal injury, death, and damage to property: we consider other types of tort and delict in Part V below. These remaining two options are as follows, and we invited comments on our views on them.

Model 1: The lex loci delicti with exception

General rule

The lex loci delicti applies.

Definition of the locus delicti for multi-state cases
[Discussed at paras. 4.61 - 4.91]

(i) personal injury and damage to property

the locus delicti is the country where the person was when he was injured or the property was when it was damaged;

(ii) death

the locus delicti is the country where the deceased was when he was fatally injured;

(iii) other cases

the locus delicti is the country in which the most significant elements in the train of events occurred.

Rule of displacement

[Discussed at paras. 4.118 - 4.123]

The lex loci delicti may be displaced in favour of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

[The question of a threshold requirement is discussed at paras. 4.122 - 4.123]

Model 2: The proper law

General rule

The applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Presumptions

[Discussed at paras. 4.136 - 4.141]

In the case of the following types of tort or delict, the country with which the occurrence and the parties had the closest and most real connection is presumed to be, unless the contrary is shown:

(i) personal injury and damage to property

the country where the person was when he was injured or the property was when it was damaged;

(ii) death

the country where the deceased was when he was fatally injured.

[The question of a threshold requirement is discussed at para. 4.141]

4.145 We explore the implications of these two options more closely in Part V (in connection with different types of tort and delict) and in Part VI (in connection with a number of issues which arise in tort and

delict cases). The two options have the same objective: that is, the selection in an acceptably high proportion of cases of the system of law which it is most appropriate to apply. Moreover, we think that in the great majority of cases they would in fact lead to the same result. In some senses each option is the converse of the other, in that the lex loci delicti option starts with a basic rule which is refined by means of an exception framed in proper law terms, while the proper law option starts at the other end but contains presumptions in a number of cases that the lex loci delicti applies. However, the two options are different in conception: they are based on different assumptions, their machinery is quite different, and they differ in their inherent certainty.

4.146 The fundamental questions which arise out of this Part of our consultation paper, and upon which we seek views, are -

(a) whether either of these options is acceptable;

(b) if so, whether (apart from matters of detail) the technique of one of our suggested options is to be preferred over that of the other - matters of detail are discussed in the next two Parts of our consultation paper; and

(c) if not, what other rule should be adopted.

PART V

OUR PREFERRED OPTIONS AS APPLIED TO PARTICULAR TYPES OF TORT AND DELICT

A. INTRODUCTION

5.1 In Part IV we considered the options for reform in general terms, and reached the provisional conclusion that there were in principle two acceptable options for reform among those available, namely the "lex loci delicti with exception" model and the "proper law with presumptions" model, under both of which the law prima facie applicable would be capable of displacement. We sought views on this conclusion and asked which of these two models was, in principle, to be preferred. In this Part we consider further those two models in the context of particular types of tort and delict. Our discussion in Part IV, although phrased in general terms, had primarily in mind the "basic" wrongs of personal injury, death, and damage to property; but we also expressed the view that our reformed choice of law rule should have as wide a field of application as possible, and it is therefore necessary to examine how our proposals would apply to other types of tort and delict. It would, however, not be possible to consider every single category of tort and delict. We therefore confine ourselves to types of tort and delict which are familiar to United Kingdom eyes and also of relatively common occurrence.

5.2 There are two different questions which arise for each category of tort and delict considered. These are -

(1) For the purposes of the lex loci delicti model, whether the locus delicti requires definition for multi-state cases; or, for the purposes of the proper law model, whether the country of closest and most real connection should be the subject of a presumption; and

(2) Whether each of the proposed models, including any definition or presumption thought desirable in response to question (1), is otherwise adequate to deal satisfactorily with the particular type of tort or delict under consideration, or whether further special rules are needed for the purposes of either model.

5.3 It should be borne in mind throughout that any special definition, presumption, or rule would ultimately have to be formulated in statutory language. This may prove difficult, and would also make the final structure more complex. For these reasons we lean against special provisions unless clearly desirable.

B. TWO SPECIAL ASPECTS OF PERSONAL INJURY, DEATH, AND DAMAGE TO PROPERTY

1. Traffic accidents

5.4 It does not appear likely that the definition of the locus delicti will prove difficult in the case of traffic accidents.[505] The applicable law under both the lex loci delicti model and the proper law model would therefore prima facie be that of the place where the accident occurred, whether it was personal injury, death, or merely damage to property that was involved. Both models would permit displacement in favour of the law of a place which had a closer and more real connection with the occurrence and the parties.

5.5 The prima facie applicable law under both of our proposed models is the same as that provided for by the basic rule in Article 3 of the Hague Traffic Accidents Convention. However, that Convention, which has not been signed or ratified by the United Kingdom,[506] contains a detailed system of exceptions to the basic rule, emphasising the law of the state of registration of the vehicle or vehicles. We do not believe it necessary to adopt such a scheme here, or that any special provision need be made for traffic accidents. Comments are invited.

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505 But cf. Sacra v. Sacra 48 Md. App. 163, 426 A. 2d 7 (1981).

506 The Convention has been ratified by Austria, Belgium, Czechoslovakia, France, Luxembourg, the Netherlands and Yugoslavia, and also signed by Portugal and Switzerland. In Canada, the Conference of Commissioners on Uniformity of Legislation in Canada has recommended adoption of a Conflict of Laws (Traffic Accidents) Act based on the Hague Convention. This has been enacted in the Yukon.

2. Products liability[507]

(a) Introduction

5.6 By "products liability" we mean, loosely, the non-contractual liability of manufacturers and others for damage caused by a product. Although this definition is sufficient for the purposes of the following discussion, its vagueness serves to emphasise that any special rule relating to products liability would require a statutory definition of the term. We think that the formulation of such a definition would not be easy.

5.7 The problems which arise in the field of products liability are mainly those of the multi-state case. Where the whole train of events is confined to one country, our proposed lex loci delicti model clearly applies the law of that country in the first instance. Assuming that the claim is for personal injury, death or damage to property, the same result would be reached by the proper law approach, upon applying the proposed presumption that the country with which the occurrence and the parties had the closest and most real connection was that of the injury or damage.[508] In both cases, the law prima facie applicable would be capable of displacement. We see no reason for any different approach in this situation, but comments are invited.

(b) The multi-state case

5.8 However, products liability cases are likely to involve more than one country. For example, the following may all be different -

(i) the country or countries where the product is manufactured or assembled, or from which its components come;

(ii) the country of the producer's place (or principal place) of business;

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507 The literature on this topic is large, but see Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703; and Hague Conference, Actes et documents de la Douzième session (1972), Vol. III.

508 See above, para. 4.140.

(iii) the country where the product is put on the market;

(iv) the country where the product is re-sold, or otherwise disposed of (whether foreseeably or not);

(v) the country or countries where the product causes injury or damage;

(vi) the country where the injury or damage becomes apparent, and the further country in which it continues.

5.9 It is quite easy to construct an example which is this complicated. For example, a travel-sickness drug might be manufactured in Italy by a Swiss concern, from chemicals imported from the United States and Japan, and put on the market in Holland. A consumer buys some in Holland but does not use it; instead it is given to another person in England, who while on a car trip through Europe consumes some aboard a French ferry on the high seas and some in Belgium, falls ill in Germany, and remains ill in Austria.

5.10 Cases decided for jurisdictional purposes under R.S.C., O.11, r. 1(l)(h), or its equivalent elsewhere,[509] have tended to emphasise the place of conduct, and have generally not admitted that the place of injury is the place where the tort or delict occurred.[510] Some of those cases have,

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509 There is no direct equivalent to R.S.C., O. 11, r. 1 in Scotland, as service is irrelevant to questions of jurisdiction. Apart from the usual grounds of jurisdiction, such as the defender's residence or carrying on business, jurisdiction in delict is conferred on the Court of Session and the Sheriff if the delict was committed in Scotland or the Sheriffdom, as the case may be: see Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, s. 1.

510 George Monro Ltd. v. American Cyanamid and Chemical Corporation [1944] 1 K.B. 432 (C.A.); Abbott-Smith v. Governors of University of Toronto (1964) 45 D.L.R. (2d) 672 (where it was suggested that a tort was committed within the jurisdiction only if all its elements occurred there); Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 (P.C); Leigh Marine Services Ltd. v. Harburn Leasing Agency Ltd. (1972) 25 D.L.R. (3d) 604; Macgregor v. Application des Gaz [1976] Qd. R. 175; Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248 (C.A.). A different approach was, by contrast, adopted in Moran v. Pyle National (Canada) Ltd. (1973) 43 D.L.R. (3d) 239.

however, defined the conduct in such a way that (as defined) it occurred in the same country as the injury and the forum.[511] In Scotland it has been held[512] that, for the purposes of section 1(1) of the Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, a material breach of duty inside Scotland is sufficient to give jurisdiction to the Scottish courts no matter how substantial the breach of duty might be outside Scotland. For the reasons given in paragraph 4.68 above, cases decided for jurisdictional purposes are however of limited relevance in the context of choice of law.

5.11 Different attempts to solve the problem of choice of law in products liability cases have been made in the Swiss proposals[513] and in the Hague Products Liability Convention.[514] Subject to two exceptions,[515] the Swiss proposals provide for the application, at the claimant's option, of either the law of the wrongdoer's place of business ("établissement") or habitual residence; or the law of the country where the product was acquired, unless the wrongdoer shows that the product was put on the market there without his consent. The approach of the Hague Convention is rather different. The applicable law is chosen according to a sophisticated scheme which relies on the particular

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511 Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 (P.C.); Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248 (C.A.).

512 Russell v. F.W. Woolworth & Co. Ltd. 1982 S.L.T. 428, 431. The rules as to jurisdiction, in England and Wales, in Northern Ireland, and in Scotland, will of course be changed when the Civil Jurisdiction and Judgments Act 1982 comes fully into force: see, in particular, Schedule 1, articles 2, 5(3) and 6; Schedule 4, articles 2, 5(3) and 6; and Schedule 8. The Law Reform (Jurisdiction in Delict) (Scotland) Act 1971 will be repealed by the 1982 Act when the relevant provision is brought into force.

513 Article 131: see Appendix.

514 The Convention has not been signed or ratified by the United Kingdom. It has been ratified by France, the Netherlands, Norway and Yugoslavia, and also signed by Belgium, Italy, Luxembourg and Portugal.

515 Article 14 and article 131(3): see Appendix.

clustering in any individual case of four stated contacts. The result is as follows: by article 5, the law of the habitual residence of the injured party[516] applies if his habitual residence is also -

(i) the principal place of business of the wrongdoer;[517] or

(ii) the place where the injured party acquired the product.

Failing this, article 4 provides that the law of the place of injury applies, provided this is also -

(i) the habitual residence of the injured party; or

(ii) the principal place of business of the wrongdoer; or

(iii) the place where the injured party acquired the product.

If the actual combination of contacts does not correspond with either of these, then, by article 6, the applicable law is that of the principal place of business of the wrongdoer, or (at the claimant's option) that of the place of injury. The application of the law of the habitual residence of the injured party or of the place of injury is also always subject to a test of foreseeability which we mention below.[518]

5.12 We have reservations about both of those schemes. In the first place, and for the reasons outlined in paragraph 4.76 above, we are unhappy about the possibility that the applicable law may be determined by the claimant. Secondly, we believe (for reasons which will appear below[519]) that both the Swiss proposals and the Hague Convention emphasise the principal place of business or the habitual residence of the wrongdoer, or the habitual residence of the injured party, to a greater degree than is appropriate. Finally, in attempting a high degree of sophistication, the scheme of the Hague Convention has also resulted in a

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516 The Convention refers in fact to "the person directly suffering damage".

517 The persons to whom the Convention applies are listed in article 3.

518 Paras. 5.23 - 5.24.

519 Paras. 5.15, 5.17.

high degree of elaboration. It also constitutes a self-contained choice of law system, which attempts to achieve the right choice of law expressly in every case. This may limit its relevance to our own proposals, where any provision on products liability would be intended to fit within a larger scheme and would be intended to provide only a prima facie rule which was capable of displacement.

5.13 Assuming, then, that neither an elective solution nor a scheme as elaborate as that of the Hague Convention should be incorporated into our reformed choice of law rule in order to cater for products liability cases, the question nevertheless remains whether our proposed reforms require to be modified to deal with such cases, despite the difficulties which would be associated with any attempt to define them in statutory form. In the absence of special provision for products liability cases, the prima facie result of either of our proposed choice of law rules would be the application of the law of the country where the claimant was injured or the property damaged. This now requires to be examined more closely, since in some circumstances it may be thought unjust to a producer to apply the law of the country where the injury or damage occurred: the connection between elements in the train of events is generally looser in a products liability case than it is in the case of conduct which produces direct results upon the victim. The producer of a product merely launches it in a given place; where it travels thereafter will depend entirely upon where the final recipient happens to go, which may be outside the producer's control, his knowledge, or even his ability to forecast. Further, the place of injury may be difficult to identify, as for example where the injury is the cumulative effect of the consumption in different places of defectively manufactured pills.[520]

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520 Another example is provided by Continental Oil Co. v. General American Transportation Corp. 409 F. Supp. 288 (1976). This case concerned 46 railway tank cars (31 of which had been delivered in Pennsylvania, 12 in Texas, and 3 in Ohio) which slowly developed cracks while they were being used throughout the eastern United States.

5.14 In the context of products liability, therefore, there would appear to be two remaining questions. The first is whether, in a multi-state case, a country other than the country of injury has a greater prima facie claim to application; the second is whether a test of foreseeability should be introduced into the choice of law rule as it applies in products liability cases. It should be recalled that, under either of our proposed models, the law prima facie applicable would always be capable of displacement in appropriate circumstances, and the law of the country with which the occurrence and the parties had the closest and most real connection applied instead.

(i) Does a country other than the country of injury have a greater prima facie claim to application in a multi-state case?

(a) Claimant's habitual residence

5.15 The claimant's habitual residence does not seem to us to be relevant independently of the circumstances of the occurrence, although it will in many cases (no doubt) be the same as the country of acquisition or the country of injury. But where, for example, a consumer habitually resident in England buys a product in France, it would not appear easy, wherever the injury occurred, to justify the application of English standards of product liability instead of French simply because the claimant had his habitual residence in England. It does not seem to us to be right in principle that a claimant should always be able to carry the products liability law of the country of his habitual residence with him wherever he goes. As between the law of the country of injury and that of the country of the claimant's habitual residence, our view is that it is the law of the country of injury which has the greater prima facie claim to application.[521]

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521 Compare, however, the choice of law rule in tort and delict proposed by the Private International Law Committee of the Civil Code Revision Office of Quebec, whereby the applicable law would (subject to a proviso) be that of the claimant's habitual residence. This rule would not be confined to products liability cases. See Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 647-648, and Morse, p. 344.

(b) Country of manufacture

5.16 The country of manufacture is in our view likely to be even less relevant. In the first place, it may well be a country which was selected by the producer for purely commercial reasons and which has no connection at all with the subsequent pattern of distribution of the product. Why, for example, should South Korean standards of product liability apply to goods ordered for and sold by a British concern and intended for the British market, simply because they were made in South Korea? Secondly, there may be no single country of manufacture even for an individual article. Thirdly, it may not be easy or even possible for the claimant to ascertain the country of manufacture. Fourthly, if the law of the country of manufacture were to apply, different laws relating to products liability would routinely attach to different products marketed in the same country,[522] and perhaps even to different examples of the same product (since these may be manufactured in different places).

(c) Producer's place of business

5.17 The final difficulty mentioned in the previous paragraph would also occur here: if the law of the producer's place of business applied, different laws relating to products liability would routinely attach to different products all marketed in the same country. In any event, however, the prima facie application of the law of the producer's place (or principal place) of business does not seem to us to strike the right balance between the interests of the producer and those of the injured party. There may, of course, be circumstances in which it is right to apply a law which is not that of the place of injury. In such a case it may indeed be that the law of the producer's place of business should apply. An example is, perhaps, where the law of the place of injury would make the producer liable, while the law of the producer's place of business (being

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522 This does not in practice necessarily imply different standards; but, to the extent that it does, it has been suggested that the application of different standards may in certain circumstances be contrary to the General Agreement on Tariffs and Trade, article III, and to the European Community Treaty, article 30: see Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703, 711 n. 26.

also the country of acquisition) would not, provided it was not foreseeable that the product would find its way to the country where it caused injury. However, as a prima facie rule capable of displacement, the application of the law of the producer's place of business does not seem to us to be justifiable. Many cases are likely in practice to concern products which cause injury in a country where their presence was foreseeable or even intended by the producer.

(d) Country of acquisition

5.18 The application of the law of the country of acquisition represents an intermediate solution. The fact that the place of injury may depend entirely on the movements of the claimant suggests that, at least in the simple case where a finished product is made in one country and marketed to the public in another, there may be an arguable case for the prima facie application of the law of the country where the product was acquired by the claimant. In many cases this will be the same as the country of injury, but where it is not it is arguable that the country of acquisition would be more closely connected with the train of events.

5.19 The rationale of applying the law of the country of acquisition must be that it is reasonable that the products liability standards of the market-place where a product was supplied should prevail, but that it is unreasonable to the producer to allow the determination of the applicable law to be influenced by subsequent events, such as a further private sale or gift, or a "fortuitous" place of injury. A "place of acquisition" rule thus guards against the peripatetic consumer who is injured in a place other than the place of acquisition, and also ensures that all goods marketed in the same country are in principle subject to the same standards. In many circumstances there is in our view much to be said for this approach, but it also suffers from a number of disadvantages.

5.20 If the rationale of a "place of acquisition" rule is to be adhered to, the possibility of a further private sale or gift clearly requires that the place of acquisition should be the last place in the chain of

acquisitions where the product was available through commercial channels.[523] This is easy to apply when the injured party is the person who last acquired the product through commercial channels, but the cases in which he is not give rise to difficulties. These cases include not only the private sale or gift, but also the case of the injured party who has not acquired the product at all - for example, a passenger in a defective aircraft or car. Such a person would have to find out what the country of acquisition was before the applicable law was known, but to apply the law of the country of acquisition in a case where the claimant has no knowledge of the circumstances of the acquisition in our view places too great a burden on him. Further, in the case of products for which there is commonly a second-hand market (such as aircraft or cars), it is not easy to decide on policy grounds whether it should be the new or the second-hand market-place whose standards of products liability should apply in an action against the manufacturer.

5.21 A second problem is that the acquisition may itself be an international transaction, such as the purchase of an aircraft from a foreign manufacturer. In such a case the country of acquisition requires definition, and although it would appear that the rationale of this rule would require that the country of acquisition be the acquiring, and not the disposing, party's country, the identification of the country of acquisition will nevertheless not always be as simple as may at first appear.

5.22 Finally, two matters should be recalled. First, the present discussion is directed to the question whether, in a multi-state products liability case, the prima facie applicable law should be other than that of the country of injury; secondly, whatever law is prima facie applicable, it would (if our proposals in Part IV are accepted) be subject to displacement in appropriate circumstances. Although the application of the law of the country of acquisition is in many circumstances attractive, it would

523 See Hague Conference, Actes et documents de la Douzième session (1972), Vol. III, pp. 54, 60.

appear likely that in practice this will frequently coincide with the country of injury or damage. Where the country of injury or damage is not significantly connected with the occurrence and the parties, we should expect the law of that country to be displaced in favour of the law of another, more appropriate, country. Since a "country of acquisition" rule has the other practical disadvantages just outlined, our provisional conclusion is therefore that in this difficult area the prima facie application of the law of the country of injury or damage is preferable to the prima facie application of the law of the country of acquisition. We are reinforced in this view by the fact that, if products liability cases were to be singled out for special treatment, it would become necessary to define a products liability case in order to distinguish it from any other type of case. As we have mentioned above,[524] we are not confident that this could satisfactorily be done.

(ii) Foreseeability

5.23 The remaining question is whether a test of foreseeability should be built in to our choice of law rule as it applies to products liability cases. Such a test would appear to be required by the rationale of a "country of acquisition" rule, and in that context is contained in the Swiss proposals. However, a test of foreseeability could be of wider application, and the Hague Convention contains such a test. The Hague Convention test prevents the application of the law of the habitual residence of the injured party or the law of the place of injury, not if these places were unforeseeable as such, but where the wrongdoer -

> "...establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels."[525]

The applicable law is thus always tied to the law of the producer's principal place of business or the laws of the foreseeable market-places of the product in question.

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524 Para. 5.6.

525 Article 7. The Quebec proposal mentioned in n. 521 above contains a similar test of foreseeability.

5.24 Foreseeability is, in our view, more relevant in the field of products liability than in other fields, because of the looser connection between the conduct and the results; but whether or not such a test should be built in to our choice of law rule is another matter. In the first place any test of foreseeability suffers from the disadvantages mentioned above at paragraph 4.80, and would also require a products liability case to be defined by statute. Secondly, it is not easy to see what result a test of foreseeability should be intended to procure in a products liability case. Under both the Swiss proposals and the Hague Convention, where the wrongdoer shows what he is required to show under the test of foreseeability, the result is that the law of the producer's place of business applies. However, we do not believe this to be satisfactory, because there may, in the circumstances, be a case for applying the law of some intermediate place in the train of events. Further, the designation, under our general law reform proposals, of the country of injury or damage as supplying the applicable law would in any event only provide a prima facie rule: it would be capable of displacement even in the absence of a test of foreseeability, and we do not see any point in building in such a test merely in order to supply a different prima facie rule which itself could be displaced. We have therefore reached the provisional conclusion that no test of foreseeability should be incorporated.

(c) Conclusions

5.25 Our provisional conclusions relating to products liability are, therefore, as follows:

(1) Products liability cases (even if they could be satisfactorily defined) require no special designation of the locus delicti for the purposes of our proposed lex loci delicti model for a reformed choice of law rule; nor do they require any special presumption as to the country of closest and most real connection for the purposes of the proper law model. The general rule would therefore apply in products liability cases as in others involving personal injury, death, or damage to property, and the prima facie applicable law would be that of the country of injury or damage.

(2) No other special provision applicable only to products liability cases is required; in particular, a test of foreseeability is not necessary.

We invite comments on these conclusions. Commentators who favour special rules for products liability cases are invited also to express views on how a products liability case should be defined.

C. LIABILITY RESULTING FROM THE MAKING OF STATEMENTS

1. Torts and delicts other than defamation: the multi-state case

5.26 We have reached the provisional conclusion that, in the case of torts and delicts other than defamation but which relate to the making of statements, it would not be practicable either to define the locus delicti (for the purposes of our lex loci delicti model), or to formulate a presumption as to the country with which the occurrence and the parties had the closest and most real connection (for the purposes of our proper law model). This is because such torts or delicts may in fact require more than the mere making of a statement. For example, the tort of deceit in England and Wales and in Northern Ireland, or in Scotland an action in delict arising out of a fraudulent misrepresentation, requires not only that the wrongdoer should have made a representation, but also that the claimant should have acted on it and suffered loss in consequence. In such a case there are four possible candidates for the country which would provide the prima facie applicable law:

(a) the country from which the representation originated;
(b) the country to which the representation was sent or in which it was received;
(c) the country where the representation was acted upon;
(d) the country where the claimant suffered loss.

5.27 Of the first two of these countries, we have no doubt that the second is of greater prima facie importance. Where a statement is sent from one place to another it cannot produce an effect until it is received; and it seems appropriate to us that any legal consequences which flow from a statement should prima facie be those provided for by the place of receipt as against the place of despatch. The place where the statement

was committed to paper, or posted, or where the telex was sent from, does not seem to us to have a great deal of relevance. This view is consistent with that taken in a number of English and Canadian cases concerned with applications for leave to serve process out of the jurisdiction.[526]

5.28 However, in the case of a tort or delict which does not end with the making of a statement, we do not believe that it would be useful to try to forecast which element in the train of events will usually be the most important. The circumstances of such torts and delicts are so varied that what is important in one case may be insignificant in another. Further, as in the case of products liability, the places where significant elements in the train of events occur will depend partly upon the activities of the claimant as well as on those of the wrongdoer. The wrongdoer may have intended or foreseen these activities or he may not, and this may be a relevant fact in choosing the applicable law. It is noteworthy that the Restatement Second does not attempt to indicate which law will prima facie be applicable in cases of fraud and misrepresentation, except where the statement was made and received in the same state and the plaintiff's action in reliance on it also took place there.[527]

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526 Original Blouse Co. Ltd. v. Bruck Mills Ltd. (1963) 42 D.L.R. (2d) 174; Diamond v. Bank of London and Montreal Ltd. [1979] Q.B. 333 (C.A.); Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey [1984] 2 Lloyd's Rep. 91 (C.A.); and see also Composers, Authors and Publishers Association of Canada Ltd. v. International Good Music Inc. (1963) 37 D.L.R (2d) 1 (copyright infringement in Canada by U.S. television transmission). By contrast, in Cordova Land Co. Ltd. v. Victor Bros. Inc. [1966] 1 W.L.R. 793, false representations were contained in a bill of lading, which had been delivered by the master of a ship to the shippers in Boston, Mass., and which had foreseeably been received and acted upon by the buyers in England. It was nevertheless held that the master had not delivered the bill to the buyers in England since the shippers were not to be regarded as the master's agents: therefore any representations which had been made in England had not been made by the master or his employers.

527 Section 148.

5.29 Our provisional view, therefore, is that no special rule should be adopted for torts and delicts (other than defamation) based upon the making of statements. The result would be that the general choice of law rule (either the lex loci delicti model or the proper law model) would apply in unmodified form. Comments are invited.

2. Defamation

5.30 Defamation raises particularly difficult choice of law problems. We deal with the questions which present themselves under three headings. The first is whether a prima facie applicable law should be designated for defamation cases: in other words, for the purposes of our proposed lex loci delicti model, whether the locus delicti should be defined for a multi-state case; or, for the purposes of our proposed proper law model, whether the country with which the occurrence and the parties have the closest and most real connection should be the subject of a presumption. The second question is whether any special rule should be introduced to deal with the case where the statement would give rise to no liability in the country of origin but gives rise to liability under the applicable law. The third question is whether any further special rule is required to deal with statements which would be privileged under our own internal law. We deal with these questions in order.

5.31 This section is intended to cover all actions for verbal injury, and is not intended to be confined to defamation as it is understood in English law, or as differently understood in Scots law. In particular, the word "publication" is not intended to carry any implication that the publication must be to a third party, as would be required in English (although not in Scots) law. By "publication" we include transmission of the statement to the claimant alone in cases where that is capable of founding a claim under a relevant law. Further, we do not intend to confine ourselves to claims which require injury to reputation, as would be the case in English law (although not, again, in Scots law[528]).

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528 See n. 538 below.

(a) The prima facie applicable law

5.32 Defamation involves considerations different from those raised by other torts and delicts concerning statements. In defamation cases it is primarily the statement itself, as distinct from subsequent monetary loss suffered by the claimant, that gives rise to liability; the law of defamation of many countries is aimed primarily at the protection of the claimant's reputation, not at monetary compensation for quantifiable loss. The central issue is thus what an alleged wrongdoer has said; and it is more likely in this area that a potential wrongdoer will take advice as to his potential liability for what he says.

5.33 The types of statement which may form the basis of liability in defamation may be placed in two categories. The first is the single statement, such as one contained in a letter, telephone call, telex or telegram. The second is the multiple statement, reproduced many times or reaching many destinations at once, such as a statement contained in a newspaper, a book, or a radio or television broadcast. We deal with these two types of statement separately.

(i) The single statement

5.34 Where a single statement is written, or posted, or spoken in one country and published in another (whether only to the claimant himself or to a third party), the obvious candidates as the prima facie applicable law are that of the country of origin and that of the country of publication. Other possibilities are considered below in connection with multiple statements, but between these two alternatives it is our view that the law of the country of publication has the stronger prima facie claim to application. It will almost certainly be intended, and will usually be at least foreseeable, that the statement in question would be published in the country where it was in fact published, and we can see no reason why the maker of a statement should be able to shelter behind the law of the country of origin, or (on the other hand) be subject to liability under the law of the country of origin, when the statement in question was directed away from that country and towards the country of

publication. The legal consequences which flow from publication of a defamatory statement in a particular country should, in our view, prima facie be those provided for by the law of that country.

5.35 Our provisional conclusions, therefore, are that in a defamation action based upon a single statement,

(a) where the statement originated in one country and was published[529] in another, the country where the statement was published should be considered as the locus delicti for the purposes of our lex loci delicti model for a reformed choice of law rule;

(b) for the purposes of our proper law model, the country where the statement was published should be expressly presumed to be that with which the occurrence and the parties had the closest and most real connection.

These conclusions are consistent with the view which we have taken immediately above[530] in relation to torts and delicts other than defamation but which relate to the making of statements; and are also consistent with defamation cases decided in the jurisdictional context.[531] They also correspond with the assumption which was made in Church of Scientology of California v. Commissioner of Metropolitan Police.[532] Comments are invited on our conclusions.

(ii) The multiple statement

5.36 We envisage that the approach outlined for single statements could equally well be applied to multiple statements whose publication

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529 See para. 5.31 above.

530 Paras. 5.26 - 5.29.

531 Joseph Evans & Sons v. John G. Stein & Co. (1904) 7 F. 65; Thomson v. Kindell 1910 2 S.LT. 442; Bata v. Bata [1948] W.N. 366 (C.A.). The rule of the Restatement Second is to the same effect: section 149 (but see below, n. 539).

532 (1976) 120 S.J. 690 (C.A.).

was in fact confined to a single country - for example, if it be possible, a radio broadcast transmitted from one country and received only in one other country. But where the statements complained of reach many different countries, the possibility arises that an action in the United Kingdom based upon publication abroad could involve as many different applicable laws as there were countries in which the statement was published. This possibility is viewed by some as alarming, and may well have prompted the very wide range of special choice of law rules which have been suggested for defamation cases involving a multiple statement. Indeed, one writer has listed ten possible applicable laws, to each of which there is some objection.[533] Certainly under a "country of publication" rule the claimant would either have to prove his case under many different systems of foreign law, or else choose to ignore some of the places where the defamatory matter was in fact published, and concentrate only on some of those places or on one of them.

5.37 There would appear to be two alternatives to the prima facie application of the law of the place of publication in the case of a multiple statement:

(1) to refrain from designating any prima facie applicable law (with the result that no special definition of the locus delicti would be provided for our lex loci delicti model, and no presumption as to the country with which the occurrence and the parties had the closest and most real connection would be provided for the proper law model); or

(2) to designate a prima facie applicable law designed to result in the selection of only one applicable law in respect of a multiple statement, regardless of the number of different countries in which it was published.

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533 Prosser, "Interstate Publication", (1953) 51 Mich. L.R. 959, 971-978.

5.38 It appears to us that the first alternative would not often succeed in avoiding the application of the law of the country of publication, since we believe that in the absence of contrary provision a court is in any event likely to find that the locus delicti, or the country with which the occurrence and the parties had the closest and most real connection, is in fact the country of publication. There seems to us, therefore, to be no purpose in pursuing this alternative. The second alternative could be justified either on grounds of convenience or on grounds of principle, and there appear to be two systems of law which might be selected: that of the country of origin of the multiple statement, or that of the country of the claimant's reputation.

(a) Country of origin

5.39 On grounds of convenience it could be argued that the law of the country of origin of the statements should apply. We have explained above that we do not believe this to be the right answer for single statements; and neither do we consider that it can be justified in principle as a prima facie rule for multiple statements. We do not see why the wrongdoer should enjoy immunity from the law of the country of publication merely because the statement was published in other countries as well, particularly as in this case also it will usually be foreseeable and frequently intended that the statement would be published in the country where it was in fact published. Given that, under either the lex loci delicti model or the proper law model which we propose, the prima facie applicable law could be displaced in appropriate circumstances, we see no reason why a multiple statement should be treated in principle in a way different from a single statement. A "country of origin" rule might also encourage authors or broadcasters to select a country of origin with a conveniently lenient law of defamation.

5.40 A "country of origin" rule also raises a practical difficulty: the country of origin of a multiple statement may itself require definition. For example, in the case of a broadcast, there may be several transmitters; the persons participating in the programme may be in different countries; some material may be on tape recorded in another

country. The country of origin of the particular defamatory statement may in such circumstances be hard to identify. In the case of a printed publication there are different difficulties: for example, according to Prosser, writing in 1953,

> "... the Luce publications, Time and Life, are composed and edited in New York, the plates for the issues are made in Illinois, part of the actual printing is done in Illinois and part in Pennsylvania, and all issues are distributed by Time, Inc., a Delaware corporation."[534]

(b) Country of claimant's reputation

5.41 It has been suggested[535] that liability in defamation should be decided neither according to the law of the country of origin nor according to the law of the country of publication, but, rather, according to the law of the country where the claimant's reputation is situated. This solution can be justified in principle on the basis that the tort or delict of defamation exists primarily to protect the claimant's reputation; and it would be consistent with the view taken above in Part IV (namely that the law of the country of injury is in many cases the most appropriate law to apply)[536] that in a defamation case the law of the country where the claimant's reputation had been injured should apply. If this view were taken it would in our view be inconsistent to confine it to multiple statements: it would apply equally to single statements. However, we are not attracted to this solution.

5.42 In the first place, the idea of a "reputation" is in any event a vague one, which can be localised only by a fiction.[537] It is located, if anywhere, in the minds of those who know, or know of, the claimant, and is injured only upon the publication to those persons of the statement in question. Such people may of course be very numerous and widely

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534 Prosser, "Interstate Publication", (1953) 51 Mich. L.R. 959, 975 n. 93.

535 Cheshire and North, p. 289; Morse, p. 123.

536 See paras. 4.61 - 4.91.

537 This is conceded in Cheshire and North, p. 286.

dispersed. In such a case, it would be necessary to try to find a single country where the claimant's reputation could be said to be most substantially located, if a "country of reputation" rule was to have any advantage over a "country of publication" rule. We believe that any attempt to do this would rapidly become unworkable in practice. Secondly, where a claim may be validly made which is not based on damage to reputation, as may happen in some legal systems (including that of Scotland[538]), a choice of law rule founded on the country of reputation would seem inappropriate.

5.43 The difficulty of locating the claimant's reputation has led to the suggestion that the law of the claimant's habitual residence should apply,[539] on the assumption that his reputation is likely to be principally situated there. This seems to us to be a very blunt instrument: it would not, for example, be true of many international celebrities, and it cannot in our view be justified on grounds of principle. The balance of convenience does not seem to us to call for departure from the prima facie application of the law of the country of publication.

5.44 The prima facie application of the law of the country where a person's reputation was located, or where he was habitually resident, may also lead to what in our view is a startling result: where that country was not the country of publication, it would mean that the maker of a statement could be held liable under the prima facie applicable law even

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538 In Scotland, although damage to reputation is often an important element in an action for defamation, it is not necessary in order to found a successful claim: Richie & Son v. Barton (1883) 10 R. 813 (damages recoverable for injured feelings only).

539 Article 135 of the Swiss proposals (which relates only to public defamation) refers inter alia to habitual residence: see Appendix. An analogous solution has also been adopted in at least one case in the United States: Dale System Inc. v. Time Inc. 116 F. Supp. 527 (1953), where the applicable law was that of a corporate plaintiff's domicile (although it was conceded that the law of the principal place of business might also be appropriate). See also Restatement Second, section 150 (2), (3).

though no liability would exist under the law of the country of publication. (The opposite result could of course also occur, but is not so startling.) Thus if, for example, a statement about a person whose reputation or habitual residence was in New York were published in the United Kingdom, having also originated there, under a "country of reputation" approach the law of New York would prima facie apply in a defamation action in the United Kingdom, even though no copies of the statement ever left this country.

(iii) Conclusions

5.45 It should be noted that, even under the present law, the possibility exists of a number of different laws having to be taken into account;[540] but we are not aware that this in fact gives rise to widespread difficulty, and the claimant may of course rely on the presumption that foreign law is the same as the lex fori. The large-scale international defamation litigated in the United Kingdom is likely to be a rare occurrence and we have formed the view (upon which comments are invited) that it would not in practice be worthwhile to create a separate rule or presumption for international multiple statements solely on the ground of theoretical convenience in a small number of cases.

5.46 Our provisional view, (upon which comments are invited) is, therefore, that for all defamation cases, whether based on a single or a multiple statement,

(1) for the purposes of our proposed lex loci delicti model, the locus delicti should be defined as the country of publication in the case of a statement which originated in one country and

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540 Renouf v. Federal Capital Press of Australia Pty. Ltd. (1977) 17 A.C.T.R. 35, 58-59; Cawley v. Australian Consolidated Press Ltd. [1981] 1 N.S.W.L.R. 225; Carleton v. Freedom Publishing Co. Pty. Ltd. (1982) 45 A.C.T.R. 1. This was also a matter of concession in Gorton v. Australian Broadcasting Commission (1973) 22 F.L.R. 181. See Handford, "Defamation and the conflict of laws in Australia", (1983) 32 I.C.L.Q. 452.

was published in another.[541] A third definition of the locus delicti would therefore be added to the two proposed above in Part IV;

(2) for the purposes of our proposed proper law model, the country with which the occurrence and the parties had the closest and most real connection should be rebuttably presumed to be the country of publication, thus adding a third presumption to the two proposed above in Part IV.

(b) Statement gives rise to no liability under law of country of origin

5.47 The possibility exists that under our reformed choice of law rule the applicable law will be one which would impose liability where the law of the country of origin of the statement would not.[542] Where the applicable law is not that of the country of publication but is that of another country more closely connected with the occurrence and the parties, there can (we believe) be no complaint about the application of that law; and the same is in our view true where the applicable law is that of the country of publication and publication there was intended. It is, however, arguable (especially in the case of the public media) that there should be no exposure to potential liability under a foreign law where (a) the statement in question was primarily destined for the home market,

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541 This is consistent with the present law: see the cases cited in the previous footnote and also Kroch v. Rossell et Cie. S.à.r.l. [1937] 1 All E.R. 725 (C.A.); Jenner v. Sun Oil Co. Ltd. [1952] 2 D.L.R. 526; Richards v. McLean [1973] 1 N.Z.L.R. 521.

542 It should be noted that this possibility also exists under our present rules, although it is unlikely to occur since the country of origin will often also be the forum (since that is where the wrongdoer is likely to be) and under the rule in Phillips v. Eyre or McElroy v. McAllister the lex fori is always applicable in addition to the lex loci delicti.

even though it may have been foreseeable that examples of it would be published abroad,[543] or (b) the statement would be privileged in the country of origin.

5.48 It is arguable that, if the applicable law has not seen fit to protect the maker of a statement in such a situation, then there is no reason for us to do so through our rules of private international law. It may be remarked that no such protection appears to exist under our own internal law: a statement which was published in the United Kingdom but which originated abroad would therefore enjoy only such protection as was accorded under our own internal law[544] and the fact that the statement gave rise to no liability in the country from which it originated would be irrelevant.

5.49 It is, however, possible that the applicable law might protect the maker of a statement in this situation, not by means of its internal law, but through its rules of private international law, to which no reference would ordinarily be made in an action in this country. It is, of course, one of the quirks of private international law that the result of an action in our courts may not be the same as that which would have been reached by a foreign court applying the law of the same country. This is accepted in other areas of our private international law, but it is perhaps arguable that in this particular case a reference to foreign law should include a reference to its rules of private international law, thereby introducing in this area the possibility of renvoi (which we have generally

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543 It appears, for example, that the Radio 4 "Today" programme can be heard over a large part of Europe. See also Kroch v. Rossell et Cie. S.à.r.l. [1937] 1 All E.R. 725 (C.A.), which concerned publications in England of two foreign newspapers. In deciding not to give leave to serve notice of the writ out of the jurisdiction, the court took into account that each newspaper circulated almost entirely in its country of origin, and had only a very small circulation in England.

544 In particular, it would appear that the protection afforded by the Defamation Act 1952, s.7 or the Defamation Act (Northern Ireland) 1955, s.7 would not be available. These sections provide for privilege to be accorded to certain categories of newspaper or broadcast report.

rejected in the field of tort and delict).[545] An example may make this clear. Consider a statement contained in a French newspaper of which some copies circulated in Germany. The claimant, a German, sues the author in the United Kingdom. The statement would give rise to no liability under the internal law of France because it is privileged under French law, but does give rise to liability under the internal law of Germany. The German choice of law rule (let us say) is that the applicable law in a defamation case is the law of the country of origin of the statement. The law of Germany is selected by our choice of law rule as the applicable law. If it is the internal law of Germany that is applied in an action in the United Kingdom, the claimant's action would succeed. If, however, it were the whole law of Germany, including its rules of private international law, the claimant's action here would fail.

5.50 Certainly if the applicable law does not make provision for this case at all, either through its internal law or through its rules of private international law, then we do not see any reason for remedying the deficiency ourselves through our own rules of private international law. This being so, and considering the probable rarity of the problem, we have reached the provisional conclusion that no express provision should in fact be made for any case where a statement gives rise to no liability under the law of the country of origin, but does give rise to liability under the applicable law. We invite comment on this view.

5.51 If our provisional view were disagreed with on consultation, there would appear to be two ways of dealing with the problem:

(1) a reference, as described in paragraph 5.49 above, not only to the internal rules of the applicable law, but also to its rules of private international law; or

(2) a double actionability rule whereby the law of the country of origin would apply concurrently with the law selected by our choice

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545 See para. 4.23 above.

of law rule (prima facie the law of the country of publication), and whereby the claimant would succeed in his action only to the extent that he could do so under both systems of law.

We invite comment, from any who may disagree with the provisional conclusion contained in the previous paragraph, on which of these (or what other solution) should be preferred; and also on how the cases to which any special rule would apply should be defined.

(c) Statements privileged under lex fori

(i) Absolute privilege

5.52 Absolute privilege under our own law is intimately connected, not merely with the public interest, but with the proper functioning of United Kingdom public institutions, and we do not believe it would be acceptable to ask a court in the United Kingdom to grant relief in respect of an alleged defamation if the statement in question would under our own internal law attract absolute privilege. We therefore believe that any statement which would attract absolute privilege under our internal law should benefit from this protection even if our choice of law rule were to select a foreign law to govern the question of defamation. It is hard to think of situations in which it would be necessary to invoke this protection, but we discuss below the possibility that a foreign law might apply under our reformed choice of law rule to a tort or delict which occurred wholly within England and Wales, within Scotland, or within Northern Ireland.[546] For example, a statement might be made by a witness in judicial proceedings in the United Kingdom in circumstances where the witness, the person defamed, and the subject matter of the proceedings had no connection at all with the United Kingdom apart from the fact that the litigation was taking place here.

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546 Paras. 5.89 - 5.92.

(ii) Qualified privilege

5.53 We have greater difficulty with qualified privilege. There are several different types of statement to which qualified privilege may apply,[547] and not all of these appear to involve the same policy considerations.

5.54 Where the statement in question is one of a type which is connected with the functioning of a United Kingdom public institution, or an institution in which the United Kingdom has an interest, then the privilege accorded may be seen as involving (in the context of choice of law) the same policy considerations as absolute privilege. Any defamation action based on such a statement raises questions of our own public interest, whatever the applicable law. Examples of the types of statement which we have in mind[548] are fair and accurate reports of judicial proceedings;[549] fair and accurate reports of parliamentary proceedings;[550] extracts from United Kingdom parliamentary papers[551]

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547 See Duncan and Neill, Defamation (2nd ed., 1983), para. 14.01; Gatley on Libel and Slander (8th ed., 1981), para. 442.

548 See Duncan and Neill, Defamation (2nd ed., 1983), para. 14.01 (d) to (g); Gatley on Libel and Slander (8th ed., 1981), para. 442 (4) to (9); Walker, The Law of Delict in Scotland (2nd ed., 1981), pp. 833-837.

549 At common law, this may extend to foreign judicial proceedings: Riddell v. Clydesdale Horse Society (1885) 12 R. 976; Webb v. Times Publishing Co. [1960] 2 Q.B. 535. See Gatley on Libel and Slander (8th ed., 1981), para. 600; Payne, "Qualified privilege", (1961) 24 M.L.R. 178. Section 3 of the Law of Libel Amendment Act 1888, which does not extend to Scotland, provides for certain reports in newspapers or broadcasts to be absolutely privileged: see Gatley, op. cit., para. 631.

550 It is not established whether this privilege extends to proceedings of foreign parliaments: see Gatley on Libel and Slander (8th ed., 1981), para. 635, n. 63.

551 Parliamentary Papers Act 1840, s.3; Defamation Act 1952, s.9(1); Defamation Act (Northern Ireland) 1955, s. 9(1).

or United Kingdom public registers; and statements and reports of the kinds mentioned in the Schedule to the Defamation Act 1952 or the Defamation Act (Northern Ireland) 1955.[552] In such cases we also believe that a defence of qualified privilege which would be available under our internal law should apply whatever the applicable law under our choice of law rule in tort and delict.

5.55 However, other types of statement to which qualified privilege may apply do not necessarily seem to involve our own public interest in the same way as those just mentioned. Whereas a statement concerning or in some way connected with a United Kingdom public institution could be said necessarily to raise questions of United Kingdom public interest, a statement which falls outside that description may well raise no question at all of our own public interest. The defence of qualified privilege is essentially a public interest defence, in that the statements to which it relates "are protected for the common convenience and welfare of society".[553] But where the society in question is not our own, there would appear to be no justification in principle for superimposing our own defence of qualified privilege in circumstances where our choice of law rule selects a foreign law. Consider, for example, the case of a person habitually resident in France, but temporarily posted to the London branch of a French company, whose employers wrote him a reference and sent it to another French company, in France, which was considering engaging him. The choice of law rule which we propose would apply French law in an action in the United Kingdom for defamation. However, in an action in England, there would in such a case appear to be no justification for superimposing on the French law of defamation the

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552 Protection under these Acts for such statements and reports at present exists only if they were contained in a newspaper published in the United Kingdom or broadcast from a station within the United Kingdom: ss.7(5), 9(2).

553 Toogood v. Spyring (1834) 1 C. M. & R. 181, 193; 149 E.R. 1044, 1050, per Parke B.

English defence of qualified privilege, which would be available under English internal law in analogous circumstances. The public interest which may be involved is surely the interest of the French, not the English, public; and the French rules should accordingly apply.

(iii) Conclusions

5.56 We have reached the view that our own defence of absolute privilege should always be available in a defamation action in the United Kingdom, and that some aspects of the defence of qualified privilege should also be available. Comments are invited on this view. However, we also believe that, at least in the case of qualified privilege, it would be unnecessarily complicated to provide expressly for such a defence in any implementing legislation, and that it would be satisfactory to allow these matters to be resolved by application of the general principles of public policy. We invite comments on this view also.

D. ECONOMIC TORTS AND DELICTS

1. The prima facie applicable law

5.57 The question here is whether the locus delicti should be defined for the purposes of our lex loci delicti model for a reformed choice of law rule; or, for our proposed proper law model, whether the country with which the occurrence and the parties had the closest and most real connection should be the subject of a presumption. It is, perhaps, more likely in this field than in any other that a tort or delict will be of a truly multi-state character (and, therefore, it is here that the idea of a locus delicti will be at its most fictitious). Our provisional conclusion is that in the field of economic torts and delicts generally it would be impracticable to designate the prima facie applicable law in advance.

5.58 A solution in terms of "place of acting" or "place of result" does not immediately present itself, since in this field especially there may well be many such places. An alternative solution has been adopted in Austria and in the Swiss proposals. In the case of unfair competition both the Austrian provisions and the Swiss proposals apply the law of the

state where the market affected by the competition is located,[554] and the Swiss proposals contain a similar rule for restrictive practices.[555] In the case of unfair competition, the Swiss proposals provide further that, if the act affects the interests of one particular competitor only, then the applicable law is that of the seat [siège] of the injured concern.[556] However, although the idea of designating as the prima facie applicable law that of the market affected is, in theory, attractive, we doubt whether such a provision would in practice prove useful in the context of our own proposals. It is quite conceivable that more than one market might be affected; and it is also conceivable that the market affected might be a truly supra-national one. Another reason for our conclusion that no provision should be made for a prima facie applicable law in this field is that if there were such a provision it would be necessary to define the types of case to which it applied. We believe that this would be extremely difficult.

5.59 One area in which it might, however, seem possible to make special provision is that of passing-off, where it might be suggested that the prima facie applicable law should be that of the country in which the product was passed off. However, we are reluctant to propose any special provision even in this area. The reason for this is that our courts have shown themselves able to find that acts done in the United Kingdom preparatory to passing-off elsewhere themselves amount to tortious or delictual acts which are committed in the United Kingdom.[557] This approach seems to us to be convenient and we should not wish to preclude a court in the United Kingdom from adopting the same approach in future cases.

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554 Austria: article 48(2); Swiss proposals: article 132. See Appendix.

555 Article 133.

556 Article 132(2).

557 John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917; John Walker & Sons Ltd. v. Douglas McGibbon & Co. Ltd. 1972 S.L.T. 128; White Horse Distillers Ltd. v. Gregson Associates Ltd. (1983) 80 L.S. Gaz. 2844.

5.60 We invite comments on our provisional conclusion that in the case of economic torts and delicts no definition of the locus delicti should be provided for our proposed lex loci delicti model, and no presumption provided for our proper law model, and that therefore in this respect each model should apply in unmodified form to economic torts and delicts.

2. Other questions

5.61 The more fundamental question which arises in connection with economic torts and delicts (as with the other types of tort and delict discussed in this Part) is whether any other special provision should be made to cater for them. With one important qualification our provisional conclusion is that no special provision is necessary. The qualification relates to those economic torts and delicts, in particular the ones concerned with unfair competition, restrictive practices, and anti-trust law, which it is arguable are so closely linked to national policy that it would be wrong to allow actions in the United Kingdom based on foreign legislation of this kind. Such causes of action frequently have a strongly territorial approach, and often involve special courts and procedures; and should, perhaps, be excluded from our choice of law rule in tort and delict.

5.62 The present law is not entirely clear. It is possible that a civil action under foreign anti-trust legislation might fall within the principle that our courts will not entertain an action for the enforcement, whether directly or indirectly, of a penal, revenue or other public law of a foreign state.[558] It is also possible that conduct which

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558 Anton, p. 89; Dicey and Morris, pp. 89 ff. The editors of Dicey and Morris assert at p. 94 that anti-trust legislation falls within the term "other public law".

could give rise to a claim under foreign competition, restrictive practices or anti-trust legislation might not be governed by our choice of law rule in tort and delict, but by some other choice of law rule instead.[559] However, it does not seem safe to assume that our tort and delict choice of law rule would never apply to an action based on a breach of foreign competition, restrictive practices or anti-trust law, or that such causes of action would be excluded from our courts; although in the light of British Airways Board v. Laker Airways Ltd.[560] it would seem that an action based upon the United States anti-trust legislation might not in any event succeed in an action in England.[561] Clearly, however, if the choice of law rule in tort and delict does apply, the present rule in Phillips v. Eyre or McElroy v. McAllister would now serve to prevent such an action succeeding in this country; but this would not be true of our proposed models for reform of our choice of law rule.

5.63 Even if it were possible to contemplate an action in the United Kingdom based on foreign anti-trust legislation, there is one feature of some such legislation which would undoubtedly be viewed here as

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559 A claim by Laker Airways Ltd. against British Airways and others in the United States courts alleges, first, "Combination and conspiracy in restraint of trade and to monopolize", and, secondly, "intentional tort". It is only the first of these claims which invokes the United States anti-trust legislation. The complaint of Laker Airways Ltd. in the United States action is set out as an Appendix to the Court of Appeal proceedings in British Airways Board v. Laker Airways Ltd. [1984] Q.B. 142, 208.

560 [1984] 3 W.L.R. 413 (H.L.).

561 In Laker it was common ground that the United States claim could not have succeeded in an action in England, partly because "[t]he Clayton Act which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application, ... ": [1984] 3 W.L.R. 413, 420 per Lord Diplock. This legislation was described both at first instance and in the Court of Appeal as "penal": [1984] Q.B. 142, 163 per Parker J; 201 per Sir John Donaldson M.R.

objectionable, namely the remedy of multiple damages. The existence of sections 5 and 6 of the Protection of Trading Interests Act 1980 arguably raises the inference that it would be contrary to public policy for a court in the United Kingdom to grant such a remedy directly, and in any event a right to multiple damages under a foreign law which was being applied in an action in the United Kingdom would no doubt be viewed here as penal and therefore unenforceable. However, as we mention below in paragraph 5.65, even if courts in the United Kingdom were to entertain actions based on foreign anti-trust legislation, it would be possible to provide expressly that multiple damages were not to be recoverable in such an action.

5.64 It should also be pointed out that some of the objections which have been raised in the past to foreign anti-trust legislation do not apply in the context which we are now considering. The objections which have formerly been raised have largely been to the assertion by foreign courts of extraterritorial rights in relation to anti-trust legislation,[562] but these objections would not apply if our new rules of private international law permitted actions based on such legislation to be brought in our own courts.

5.65 In relation to torts or delicts based on competition, restrictive practices or anti-trust law there would therefore appear to be two possibilities.

(1) Our reformed choice of law rule could contain no special provision relating to such torts and delicts. If they fall within the scope of a choice of law rule in tort and delict, such torts and delicts would therefore be dealt with by the new choice of law rule in unmodified form.

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562 See, e.g., Jennings, "Extraterritorial jurisdiction and the United States antitrust laws", (1957) 33 B.Y.I.L. 146; British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd. [1953] Ch. 19 (C.A.) and [1955] Ch. 37; Protection of Trading Interests Act 1980.

(2) Such torts and delicts could expressly be wholly excluded from any new choice of law rule, with the result that the present law (whatever it is) would continue to apply to them.

Either solution could also be qualified by an additional provision as to the remedies available in an action in the United Kingdom upon such a tort or delict. To the extent that the remedy is an injunction or interdict, it may be that no problem would arise, in view of the degree of discretion available to the courts in respect of these remedies. As regards the remedy of multiple damages, it would be possible to restrict the damages recoverable in an action based on a foreign anti-trust law to such damages as represented compensation, and to exclude the recovery of any other or larger sum. This is the approach which has been adopted in the Swiss proposals.[563]

5.66 We have reached no conclusion on these matters. We therefore invite comments on -

(a) whether one of the alternatives mentioned in the previous paragraph is to be preferred, and, if so, which;

(b) if special provision is to be made for certain kinds of economic tort or delict, the kinds of tort or delict to which the provision should extend, and how such torts or delicts are to be defined for statutory purposes;

(c) in particular, whether any special provision should be made as to the remedies available in an action in the United Kingdom upon a tort or delict based on foreign competition, restrictive practices or anti-trust law.

E. INTERFERENCE WITH GOODS

5.67 By "interference with goods" we mean, in general, cases involving denial of title, such as conversion. As to whether the locus

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563 Article 133(2): see Appendix.

delicti should (for the purposes of our lex loci delicti model) be defined in a multi-state case of interference with goods, or whether a presumption should be made for the purposes of our proper law model as to the country with which the occurrence and the parties had the closest and most real connection, our provisional conclusion is that no such provision need be made. The place of result may in this case suffer from the same disadvantages as the place of acting, in that each may be difficult to identify, and may well have little connection with the train of events taken as a whole. The alternative would appear to be the prima facie application of the law of the place where the goods were situated at the time of the wrongful acts (the "lex situs"). This may appear to have two advantages: the lex situs generally governs also the validity of a transfer of moveables,[564] and the place where the goods are situated may lend itself to easy and objective ascertainment. However, application of the lex situs involves the possibility of introducing what may appear to be an entirely irrelevant law, from which it would then be necessary to escape by resorting to the exception to the general rule (if our "lex loci delicti with exception" model were adopted) or to the general residual rule itself (if our proper law model were adopted).

5.68 We have also reached the provisional conclusion that there is no other special problem arising out of torts and delicts involving interference with goods. In our view, therefore, no special provisions are required in this area. Comments are invited on our conclusions.

F. NUISANCE

5.69 If there is to be provision for a prima facie applicable law in this area, there would appear to be a clear choice between the law of the place from which the nuisance emanates, and the law of the place where

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564 Winkworth v. Christie Manson and Woods Ltd. [1980] Ch. 496. See Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 886-887.

it produces the result complained of.[565] If one or the other of these is to be chosen, then we believe it should in principle be the latter;[566] and in so far as a nuisance also gave rise to personal injury or damage to property, it would be desirable to apply the same law in respect of both. However, if there were provision for a prima facie applicable law in this area, it would become necessary to define the cases to which it related; and this, we think, is likely to present a problem. It is, in our view, important where possible to avoid disputes over whether or not a particular rule applies. Difficulties of definition at once raise the likelihood of such disputes.

5.70 It is perhaps more likely in this area than most that the activity complained of will be at least permitted under the law of the place where it is being carried on, and perhaps expressly licensed there. Although we envisage that this fact would be considered by a court as one of the relevant circumstances, such permission or licence cannot extend to producing damage in a foreign country, at least where an action in a foreign court is concerned.[567] We do not however believe it necessary to make special provision for this point, or that any other special provision

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565 The Swiss proposals contain a special provision for certain types of nuisance, which allows the claimant to choose between these two systems of law: article 134.

566 This result has been reached in a jurisdictional context: Town of Peace River v. British Columbia Hydro and Power Authority (1972) 29 D.L.R (3d) 769. In Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R (3d) 321, which concerned pollutants introduced into rivers in two Provinces of Canada but which caused damage in a third, Laskin C.J.C. in the Supreme Court of Canada (with whom Judson and Spence JJ. concurred) was clearly of the view that a tort had occurred in the third Province (pp. 339, 343 and 351 respectively), but Ritchie J. appeared to be of the opposite view (pp. 348-349). The views of the remaining three judges are unclear. According to Hurlburt, (1976) 54 Can. Bar Rev. 173, 174 they agreed that a tort had occurred in the place of result, but according to Dicey and Morris, p. 972, n. 53, they were of the opposite view. Compare, in the jurisdictional context, Handelskwekerij G.J. Bier B.V. & Stichtung Reinwater v. Mines de Potasse d'Alsace S.A. [1976] E.C.R. 1735, [1978] Q.B. 708 (European Court of Justice).

567 See Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R (3d) 321.

is necessary to deal with cases of nuisance. Comments are invited on our conclusions.

G. TORTS OR DELICTS INVOLVING SHIPS OR AIRCRAFT

1. Collisions on or over the high seas and other like cases

5.71 In certain circumstances an action in this country will under the present law be decided according to the principles of maritime law as applied in England and Wales, in Scotland, or in Northern Ireland, or (in other words) according to the lex fori,[568] and in these circumstances it would appear that our present choice of law rules in tort and delict do not apply at all.[569] The extent of the circumstances covered by these principles is not entirely clear, but it is at least clear that they cover collisions on the high seas, which in practice will be the most important type of tort or delict involving a ship.

5.72 Whatever the present law may be in this limited field, we are not aware that it gives rise to any problem, and we do not propose that our reformed choice of law rule should interfere with any area of the law which now requires the application of the general principles of maritime law or where the existing rule of double actionability does not apply. The result would be that, in practice, our proposals for a new choice of law rule in tort and delict would not affect cases concerning collisions on the high seas, or any other case to which the principles of maritime law extend, or to which our existing choice of law rules do not apply. Whether an express exclusion will be required in any implementing legislation may depend upon whether or not it is safe to assume that our existing choice of law rule does not extend to cases involving the maritime law.

5.73 We invite comment on our conclusions and in particular upon whether it would be desirable to incorporate an express exclusion in any event, and (if so) upon how the area in question should be defined for statutory purposes.

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568 This is explained above at paras. 2.107, 2.108.

569 See above, para. 2.109.

5.74 It also appears likely that our choice of law rule in tort and delict would not apply to collisions of aircraft over the high seas.[570] If our present choice of law rule is of no application we do not propose that our reformed choice of law rule should apply to such cases.

2. The application of our proposed models for reform

5.75 Both of our proposed models for reform require clarification in the context of the remaining torts and delicts involving ships or aircraft. For our "lex loci delicti" model, and also for the purposes of any presumptions included in our "proper law" scheme, the question is: where an event takes place aboard a ship or aircraft, in what country should it be considered as having occurred? A number of different situations can be envisaged. We discuss these first and consider what law should in principle be prima facie applicable. In the light of this we then draw provisional conclusions as to how our proposed models for reform should be adapted. Where we refer to ships only, this is merely for convenience: the same considerations will apply where aircraft are concerned.

(a) Train of events confined to one ship or aircraft

(i) On or over the high seas

5.76 Where a ship is on, or an aircraft is over, the high seas, and the whole train of events is confined to that ship or aircraft, there would seem to be much sense and little difficulty in considering the state to which the ship or aircraft belongs[571] as being, for choice of law purposes, the country where the events occurred. This approach may well be consistent with the present law as it applies to ships, although probably not as it applies to aircraft.[572]

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570 It appears that the lex fori applies to such cases and that the principles of maritime law are not relevant: see McNair, The Law of the Air (3rd ed., 1964), pp. 289-290.

571 We consider this concept below at paras. 5.84 - 5.86.

572 See above, paras. 2.110, 2.113.

(ii) In territorial waters, or over land or territorial waters

5.77 In our view the same solution would be appropriate for the ship in territorial waters, whether ours or foreign; and the prima facie irrelevance of any system of law other than that of the flag is even clearer in the case of a tort or delict committed on board and confined to an aircraft, whether flying over the United Kingdom or a foreign country.[573] "It requires some boldness to contend that because an aircraft happens to be over Switzerland at a particular moment Swiss law should be applicable to events occurring in the aircraft at that time, and that Austrian or Italian law may similarly become relevant a few minutes later."[574] This approach would produce results consistent with decisions in the United States, at least where the dispute involved only the internal running of a ship,[575] and enjoys academic support.[576] Further, this approach commended itself on practical grounds to the court in MacKinnon v. Iberia Shipping Co. Ltd.[577] (which in our view provides a clear example of circumstances in which its use would have been appropriate). However, the court in that case was constrained to reject this approach[578] and to apply instead the double actionability rule in McElroy v. McAllister.

(b) Train of events not confined to one ship or aircraft

(i) Train of events occurs wholly or partly on or over the high seas

5.78 What we envisage here is a case involving, for example, two or more ships on the high seas, or a ship on the high seas and another in

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573 See, e.g., Dicey and Morris, pp. 977-978; Kahn-Freund, pp. 82-83.

574 McNair, The Law of the Air (3rd ed., 1964), p. 267.

575 Patton-Tully Transp. Co v. Turner 269 F. 334 (1920); Lauritzen v. Larsen 345 U.S. 571, 97 L. Ed. 1254 (1953); Romero v. International Terminal Operating Co. 358 U.S. 354, 3 L. Ed. 2d 368 (1959). See Kahn-Freund, p. 81.

576 See, e.g., Dicey and Morris, p. 977; Kahn-Freund, pp. 81-82.

577 1955 S.C. 20.

578 See above, para. 2.45.

national waters, or a ship on the high seas involved in a train of events where other elements occur ashore; but in circumstances where our choice of law rule would apply (and which, therefore, do not call for the application of the general principles of maritime law, and do not involve the continental shelf regime[579]). It must be admitted that it is hard to conceive of such a case, but an example might be a defamatory statement communicated from one ship to another, or from a ship on the high seas to dry land or vice versa; or an injury caused on board one ship as a result of conduct aboard another; but not a collision on the high seas, to which different rules apply.[580] Here again we believe that an event which occurs on board a ship or aircraft may initially be treated, for choice of law purposes, as having occurred within the state to which the ship or aircraft belongs.

(ii) Train of events occurs wholly within or over national waters or partly there and partly on or over the adjoining land

5.79 The possibilities under this heading are the most complicated, since, although it is possible to conceive of cases (such as those mentioned in paragraph 5.78 above) which have no prima facie connection with any littoral or subjacent state, it is also possible to conceive of cases where the train of events is not confined to one ship or aircraft but which does have a connection with the littoral or subjacent state. Examples of the latter might be collisions within territorial waters, whether with another ship or with a fixed structure, or injuries caused ashore by part of a ship's machinery.

5.80 In these circumstances a case can be made in principle for adopting a different approach from the one we have suggested above, since here it might not be convenient to view a ship or aircraft as carrying its own law with it: it appears much more likely in these cases than in the others which we have mentioned that the occurrence and the parties will have at least some connection with the littoral or subjacent country. If this view were accepted, there would in this case

579 See above, paras. 2.106 - 2.109.

580 See above, paras. 2.107 - 2.109.

be an exception to the rule relating to ships or aircraft, and the train of events would be treated as having occurred in the littoral or subjacent country. On balance, however, we do not favour the creation of such an exception, for the reason stated below.

(c) Our provisional conclusions

5.81 The conclusion from the foregoing discussion is that, for the purposes of our reformed choice of law rule in tort and delict, an event (whether conduct or result) which takes place aboard a ship or aircraft should be regarded as having taken place in the state to which the ship or aircraft belongs in all circumstances except perhaps where the train of events takes place wholly within territorial waters or over national territory but is not confined to a single ship or aircraft. We are however not persuaded that the degree of refinement represented by the exception would necessarily be justified in any implementing legislation. By way of compromise, there would appear to be two simpler alternative possibilities:

either (1) provide without exception that all events taking place aboard a ship or aircraft are to be treated for choice of law purposes as having taken place in the state to which the ship or aircraft belongs, whether or not the train of events was confined to a single ship or aircraft;

or (2) provide only that a train of events which is confined to a single ship or aircraft is to be considered for choice of law purposes as having taken place in the state to which the ship or aircraft belongs; and make no provision at all for a train of events not confined to a single ship or aircraft.

In view of the likely rarity of a train of events which is not confined to a single ship or aircraft and which is not a collision, our provisional view is that alternative (2) should be preferred, but comments are invited.

5.82 Whether alternative (1) or alternative (2) above were preferred, the result would be to locate, for choice of law purposes, an event which took place aboard a ship or aircraft. This in turn would mean that such events could be brought within our reformed choice of law

rule. For our proposed lex loci delicti model, where a relevant event occurred aboard a ship or aircraft the locus delicti would be defined as the state to which the ship or aircraft belonged,[581] and the lex loci delicti as thus defined would be the prima facie applicable law. For the presumptions attached to the proper law model, the country with which the occurrence and the parties had the closest and most real connection would be similarly identifiable. Both the lex loci delicti and the presumed proper law would then be capable of displacement in the ordinary way, if the occurrence and the parties had in fact a closer and more real connection with another country.

5.83 We invite comments on the scheme which we have outlined for bringing ships and aircraft within the scope of our proposed models for reform of our choice of law rule in tort and delict.

(d) Two problems of definition

(i) "State to which a ship or aircraft belongs"

5.84 In the case both of a ship and of an aircraft, the state to which it belongs may be identified by the state where it is registered.[582] A problem arises, however, where that state itself contains more than one country - for example, the United Kingdom consists of England and Wales, Scotland, and Northern Ireland, which are different countries for choice of law purposes.

5.85 This problem is, we believe, easily resolved in the case of a ship: the appropriate country is that of the ship's port of registry.[583] This, however, will not always work in the case of an aircraft, since (at least in the United Kingdom) an aircraft has no equivalent of a port of registry: instead, aircraft are in this country registered by the Civil

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581 We discuss below, at paras. 5.84 - 5.86, the problem of the state containing more than one law district.

582 Compare Wills Act 1963, s.2(1)(a).

583 As provided for, in the United Kingdom, by the Merchant Shipping Act 1894, s.13.

Aviation Authority on a United Kingdom basis.[584] We understand[585] that it would not necessarily be helpful to refer to the addresses of the registered owners, since an aircraft may have more than one owner and there is no requirement that the owners provide an address in the United Kingdom. Equally, it is not necessarily easy to establish the identity of the "operator"[586] of a particular flight, and there is no requirement that the operator be designated in any document.

5.86 Our provisional view is that the difficulties which may sometimes be associated with connecting an aircraft with a particular country should not lead to the conclusion that aircraft should be excluded from our scheme. Comments are invited on this view, but we also seek views on whether there is a way, consistent with the existing practice on registration of aircraft, of reducing or avoiding the difficulty outlined in the previous paragraph.

(ii) When does an act take place on board a ship or aircraft?

5.87 In any scheme where it may be significant whether or not an event occurs aboard a ship or aircraft, it may be necessary to define what is meant by this expression. Again we believe that no problem will arise in relation to ships, and that the question can be left to judicial interpretation. In relation to aircraft we believe that it would be desirable to confine the application of our special rule to an aircraft in flight, so that if a tort or delict occurred aboard an aircraft on the ground while it was being serviced, no significance would attach to the fact that it occurred on board an aircraft. We do not, therefore, adopt the

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584 Air Navigation Order 1980, S.I. 1980 No. 1965, article 4. The Chicago Convention (1944) (Cmd. 8742), article 17, provides that aircraft have the nationality of the state in which they are registered.

585 We are grateful to the Civil Aviation Authority for their assistance on these matters.

586 Defined in Air Navigation Order 1980, S.I. 1980 No. 1965, article 93(5).

suggestion that any rule which applied to aircraft should extend also to "...the waiting room of an airport reserved for passengers 'in transit' ".[587]

5.88 We are aware of two definitions of "in flight", one in article 93(3) of the Air Navigation Order 1980, the other in section 38(3)(a) of the Aviation Security Act 1982. We understand that difficulties can arise with the former, and we therefore propose a definition based on the latter.[588] Comments are invited.

H. TORTS OR DELICTS OCCURRING IN A SINGLE JURISDICTION WITHIN THE UNITED KINGDOM

5.89 As we have noted above,[589] our present choice of law rule in tort and delict may not apply at all where the locus delicti is the country of the forum; or, if it does apply, it produces the same result as if it did not (except, perhaps, where the Boys v. Chaplin exception is in issue) since in such a case the lex fori and the lex loci delicti are identical. In any event it has not yet been necessary to decide the question whether our present choice of law rule applies or not; but this is a question which will have to be answered for the purposes of our reformed choice of law rule. If our new choice of law rule is not to apply, a tort or delict which occurred within the jurisdiction of the forum would be governed by the lex fori alone.

5.90 It would be possible to exclude such torts and delicts from our proposed lex loci delicti model, which would simply not apply where the locus delicti was the same as the country of the forum. It would be less easy to exclude such torts and delicts from our proposed proper law

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587 Kahn-Freund, p. 83.

588 This reads as follows: "the period during which an aircraft is in flight shall be deemed to include any period from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and, in the case of a forced landing, any period until the competent authorities take over responsibility for the aircraft and for persons and property on board".

589 Paras. 2.47 - 2.48.

model, since that model does not rely on the notion of the locus delicti. Some attempt would therefore have to be made to define the torts and delicts which were to be excluded. This could, for example, result in the exclusion of cases where a person was injured or property damaged within the jurisdiction of the forum, and of defamatory statements published at the forum, regardless of where other elements in the train of events had occurred; in all other cases it would presumably result either in the exclusion of those torts and delicts all of whose elements occurred within the jurisdiction of the forum, or in the exclusion of those torts and delicts any one or more of whose elements occurred within the jurisdiction of the forum. Any other solution would appear to detract from the usefulness of the proper law model by introducing into it the very notion of the locus delicti which it is at pains to avoid.

5.91 Where the train of events occurred at the forum it would, no doubt, be highly unlikely (in view of the additional fact that the action was being brought there) that another country would have a closer and more real connection with the occurrence and the parties. Further, it is to be expected that courts in the United Kingdom would be reluctant to apply a foreign law in a case involving a train of events which had occurred at the forum, even if the occurrence and the parties had a closer connection with another country.[590] Nevertheless it is possible to conceive of remote cases where a law other than the lex fori might be appropriate. The case of Szalatnay-Stacho v. Fink,[591] which is usually

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590 This seems, at any rate, to be a lesson which can be learned from the United States: see, for example, Kell v. Henderson 26 A.D. 2d 595, 270 N.Y.S. 2d 552 (1966); Conklin v. Horner 38 Wis. 2d 468, 157 N.W. 2d 579 (1968); Bray v. Cox 39 A.D. 2d 299, 333 N.Y.S. 2d 783 (1972); Milkovich v. Saari 203 N.W. 2d 408 (1973). Cf., for example, Arbuthnot v. Allbright 35 A.D. 2d 315, 316 N.Y.S. 2d 391 (1970) and Hunker v. Royal Indemnity Co. 57 Wis. 2d 588, 204 N.W. 2d 897 (1973), where the lex fori was not applied. It will be recalled, however, that the governmental interest analysis method for choice of law as it was originally propounded by Currie requires the application of the lex fori if the forum has an interest which would be furthered by applying its law: see para. 4.36 above.

591 [1947] K.B. 1 (C.A.). On this case, see Dicey and Morris, pp. 932-933, 945; Kahn-Freund, p. 84; Morse, pp. 294-295.

cited in support of the proposition that English law will apply to torts committed in England, would appear to provide an example of circumstances which might justify the application of a foreign law, although the events occurred wholly in England: it concerned the alleged defamation of the Czechoslovak Acting Minister in Cairo by the General Prosecutor of the Czechoslovak Military Court of Appeal in a letter to the Military Office of the President of Czechoslovakia. The events took place in London since at the time, owing to the occupation of Czechoslovakia, that was where its government was functioning. Another example might be provided by the facts of McElroy v. McAllister: if the action in that case had been in England, and not in Scotland, it might seem appropriate that Scots law and not English should have applied. A final example might be an action in defamation based upon the publication in Scotland of a few copies of a French newspaper which contained an article intended to be read in France although written by a Scotsman.

5.92 It seems to us, therefore, that as a matter of principle the reasons which justify the existence of exceptions to the strict application of the lex loci delicti where the locus delicti is foreign apply just as strongly if the locus delicti is England and Wales, or Scotland, or Northern Ireland, and we can see no reason of principle for excluding such cases from the operation of our proposed new choice of law rule. We have therefore reached the provisional conclusion that our reformed choice of law rule (whether it be the lex loci delicti model or the proper law model) should contain no such exclusion; and that it should be permitted to apply, in an action in England and Wales, or in Scotland, or in Northern Ireland, to torts or delicts which occurred in those respective places.[592] The practical effect of this is, however, likely to be slight, since as we have said it is in practice hard to think of cases where the parties and the occurrence would be more closely connected with another country. Comments are invited on our provisional conclusion. Commentators who disagree with it are invited to define the torts and delicts which should in their view be excluded from the operation of our choice of law rule.

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592 The contrary view is tentatively advanced by Jaffey: "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113-114.

PART VI

PARTICULAR ISSUES

A. INTRODUCTION

6.1 There are certain issues which may arise in a tort or delict case whose classification is a matter of difficulty, and to which it is therefore not immediately clear whether our choice of law rule in tort and delict should apply. We have examined the present law on some of these issues in Part II. In this Part we consider how these issues should be treated in the light of our proposals for reforming the choice of law rules in tort and delict. As we have seen above,[593] courts have sometimes resorted to the device of classifying a particular issue in a case as belonging to a category other than tort or delict, in order to escape from the consequences of applying a rigid choice of law rule in tort or delict to that issue. The appropriate classification of the issues which may arise will remain important under both of our alternative proposals for a new choice of law rule in tort and delict. However, since both of these proposed alternative rules would be capable of taking the particular circumstances of an individual case into account, the desire to avoid classifying a particular issue as one in tort or delict should arise less frequently than it would under a very rigid choice of law rule.

6.2 In this Part we also consider a different question, namely whether a court should be allowed to separate different issues which may arise in the same case but all of which fall within the scope of the choice of law rule in tort and delict, and to apply that choice of law rule separately to each issue, thereby perhaps selecting different laws to govern different issues. We consider finally two other matters which might at first sight be thought to give rise to difficulty: actions with multiple parties, and the problems raised where our choice of law rule selects the law of a country where the civil action has been replaced by a compensation scheme.

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593 Para. 4.17.

6.3 In this Part we use the phrase "applicable law in tort and delict" to mean whatever system of law would be selected as the applicable law by our proposed new choice of law rule in tort and delict.

B. ISSUES RAISING QUESTIONS OF CLASSIFICATION

1. Capacity

6.4 It appears not to be controversial that the delictual capacity of an individual should be a matter for the applicable law in tort and delict,[594] and we see no reason why this should not also be so for corporations.[595] Comments are invited.

2. Vicarious liability[596]

6.5 Two questions arise in this context. The first is the determination of the law which should in principle govern whether one person may be made vicariously liable for the tort or delict of another. The second is whether any further problems remain which may require special provisions.

(a) The law which should in principle apply to the issue

6.6 As far as the first question is concerned, it seems clear that the issue of whether or not vicarious liability may exist should not be

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594 Kahn-Freund, p. 109; Morse, p. 154; Restatement Second, s.161, comment d. This is apparently an all but universal rule: Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), p. 255.

595 Although it is, no doubt, true that the acts which a corporation may do are also determined by its constitution, it does not follow that "... a corporation cannot be made liable for what, according to the law of its place of incorporation, would be an ultra vires tort." (Dicey and Morris, pp. 957-958). This does not appear to be free from doubt as a proposition of English or Scots domestic law: see, e.g., Gower, Principles of Modern Company Law (4th ed., 1979), p. 169; Smith, A Short Commentary on the Law of Scotland (1962), p. 268; Walker, The Law of Delict in Scotland (2nd ed., 1981), p. 78.

596 By "vicarious liability" we mean liability which arises by virtue of a relationship between the defender or defendant and the actor. In this context the phrase is therefore not confined to vicarious liability according to our internal law.

classified as a procedural matter.[597] Nor do we believe that there is any reason of policy for applying the lex fori alone. The two remaining alternatives appear to be (i) that the issue of whether or not vicarious liability may be imposed should be decided by the applicable law in tort and delict (as appears to be the present law[598]), or (ii) that the issue should be decided by the law which governs the relationship between the person who may be vicariously liable (whom we refer to for convenience as the "defendant"[599]) and the actual wrongdoer, and which is said to give rise to the vicarious liability. The most obvious example of such a relationship is perhaps that of employer and employee.

6.7 The argument in favour of the view that the possibility or otherwise of vicarious liability should be decided by the law which governs the relationship between the defendant and the actual wrongdoer is that only thus can the defendant be protected against an unexpected vicarious liability, and that he should be protected against such liability. We have two reservations about this solution. First, the identification of the law governing the relationship between the defendant and the wrongdoer may prove difficult.[600] A relationship of employer and employee may be easy enough to identify with a particular system of law, but it may be less easy to identify the law governing other types of relationship which may also give rise to vicarious liability: for example, the vicarious liability of the

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597 This possibility was raised in Siegmann v. Meyer 100 F. 2d 367 (1938) in the context of the liability of a husband for the acts of his wife. The rationale and origin of such liability at common law do indeed seem to be different from those of other types of vicarious liability: see Capel v. Powell (1864) 17 C.B. (N.S.) 743, 144 E.R. 298; Edwards v. Porter [1925] A.C. 1; Midland Bank Trust Co. Ltd. v. Green (No.3) [1979] Ch. 496 (aff'd [1982] Ch. 529 (C.A.)); Clerk and Lindsell on Torts (8th ed., 1929), pp. 44-45; op. cit., (15th ed., 1982), p. 132.

598 See the cases cited in n. 137 above.

599 In Scotland, this person will of course be the "defender".

600 An analogous problem has been encountered already in the context of a possible "pre-existing relationship" exception to the basic lex loci delicti rule: see above, paras. 4.103 - 4.109.

owner of a motor vehicle for the acts of its driver; and those of a parent for the acts of a child, and of a husband for the acts of his wife. In the latter two cases it has been suggested that the lex domicilii of the parent or husband should determine whether he may be made liable for the acts of his child or his wife.[601] This, however, is not the law applicable to the relationship, but only to the defendant, even if habitual residence were substituted for domicile; but to apply the law of the common domicile or habitual residence of the spouses or of the parent and child ignores the fact that they may have different domiciles or habitual residences.

6.8 It may be that in practice these difficulties would arise so rarely that they could be ignored, since in practice it is the relationship of employer and employee which is most likely to form the basis of a vicarious liability claim. But we have a second and more important reservation about deciding the issue by the law governing the relationship: we are not persuaded, public policy considerations apart,[602] that the defendant ought, in principle, to be protected from all vicarious liability other than that provided for by the law governing his relationship with the actual wrongdoer. To do so seems to us to ignore the interests of the claimant. Although the law which governs the relationship between the defendant and the actual wrongdoer may give the defendant a right of indemnity or contribution against the wrongdoer, we do not see why their rights inter se should be any concern of the claimant. Equally, we do not see why the claimant should gain a windfall if the applicable law in tort or delict would not impose vicarious liability, but the law of the relationship between defendant and wrongdoer would.

6.9 Our provisional view, upon which we invite comments, is therefore that in principle the choice of law rule in tort and delict should

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601 Kahn-Freund, pp. 104-106. Morse does not, or does not wholeheartedly, share this view: Morse, pp. 150-152. Dicey and Morris seem to suggest at p. 958 that the domicile of the parent or husband may be relevant under the present law.

602 See below, paras. 6.11 - 6.14.

apply to select the law which determines whether or not the defendant may be made vicariously liable.[603] The issue would, in other words, be treated as one in tort or delict.

(b) Qualifications to the law in principle applicable

(i) Which parties should be taken into account in the choice of applicable law?

6.10 Unless special provision were made, one possible consequence of applying our choice of law rule in tort and delict to the issue of vicarious liability is that the law applicable in an action by the claimant against the actual wrongdoer might turn out to be different from the law applicable in an action by the claimant against the vicariously liable defendant. The reason for this is that both of our proposed choice of law rules may take into account not only the occurrence but also the individual circumstances of the parties. However, the system of law applicable in an action by the claimant against the vicariously liable defendant should in our view be the same as that which would have applied in an action by the claimant against the actual wrongdoer. It is for consideration whether implementing legislation would have to provide expressly for this point. Comments are invited.

(ii) Possible public policy exceptions

6.11 If our choice of law rule in tort and delict is the one which should in principle select the law which will apply to the issue of vicarious liability, a question which nevertheless remains is whether any modification of the general rule is required on grounds of public policy. This point might arise in two ways.

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603 In the case of most types of vicarious liability this approach appears to enjoy widespread support: Dicey and Morris, p. 958; Kahn-Freund, pp. 106-109; Morse, pp. 152-153; Restatement Second, s.174; E.E.C. Draft Convention, article 11.7; Hague Traffic Accidents Convention, article 2(3); Hague Products Liability Convention, article 8(7).

6.12 The first is that it might be thought that there are certain types of relationship where to impose vicarious liability by virtue only of that relationship would be so repugnant to our own notions of justice that our courts should on public policy grounds never be faced with having to do so. Our provisional conclusion (upon which comments are invited) is, however, that it would be impracticable and unnecessary to attempt to identify such relationships in advance and provide expressly for them in any implementing legislation. If this problem were to arise in practice it would therefore be dealt with by the general rules of public policy.

6.13 The second possibility is that even though the type of vicarious liability did not offend us, the imposition of vicarious liability in the circumstances of a particular case might be thought to be so repugnant to our own notions of justice that, for reasons of public policy, the foreign law ought not to be applied, and the defendant ought therefore not to be held liable. If it were desired to prevent such a situation from arising by means of express provision, the following are ways in which this might be achieved.

(1) It would be possible to provide that vicarious liability must exist not only according to the applicable law in tort and delict, but also according to the lex fori, thereby in practice re-introducing in this area the existing double actionability choice of law rule. We do not believe this would be justified in relation to vicarious liability alone. Further, any double actionability rule has the disadvantages which we have described above;[604] and such a rule would also have the effect of shielding the defendant from vicarious liability under the applicable law in tort and delict in circumstances where there would be no objection of policy to its imposition: for example, where the defendant had authorised or required the actual wrongdoer to go to the place where the tort or delict occurred, and the lex loci delicti was the applicable law.

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604 Paras. 3.8 - 3.9.

(2) It would be possible to provide that the defendant should never be vicariously liable if the tort or delict occurred in a place which was unforeseeable by the defendant or where the actual wrongdoer had no authority to be.[605] Quite apart from any question of principle, we believe, however, that such a provision would be impracticable if it relied upon notions such as foreseeability or authorisation, which should not in our view be used in a choice of law rule;[606] the resulting rule would, we believe, be too uncertain to be acceptable. Further, such a provision would not appear easy to justify in principle, especially since the vicarious liability which would exist under the otherwise applicable law in tort and delict might be quite acceptable to our own notions of justice, or might even be such that the lex fori would also impose vicarious liability.[607]

6.14 We have therefore reached the provisional conclusion that it would not be practicable or desirable to formulate a special provision whereby the imposition of vicarious liability could be avoided in cases where we should find it so inconsistent with our own notions of justice that for reasons of public policy the defendant should not be held vicariously liable.[608] We invite comment on this point. However, if such a special provision were felt to be desirable, we invite further comment on:

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605 Considerations such as this clearly influenced the court in Young v. Masci 289 U.S. 253, 77 L. Ed. 1158 (1933) and Scheer v. Rockne Motors Corporation 68 F. 2d 942 (1934). See also Siegmann v. Meyer 100 F. 2d 367 (1938).

606 See para. 4.80 above.

607 A defendant may be vicariously liable under English or Scottish law notwithstanding that he has actually prohibited the act of the wrongdoer: see Clerk and Lindsell on Torts (15th ed., 1982), paras. 3.18, 3.19; Walker, The Law of Delict in Scotland (2nd ed., 1981), pp. 145 ff.

608 The application of a foreign law under our general choice of law rule is in any event intended to be subject to the usual public policy exception even if this is not expressly provided for in any implementing legislation: see para. 4.6 above.

(a) what provision should be made; and

(b) the circumstances in which it should operate (in other words, the type of liability to which it would apply).

3. Defences and immunities

6.15 We propose no change in the present law whereby substantive defences are governed by the applicable law in tort and delict. These would naturally be in addition to any jurisdictional immunity (such as state or diplomatic immunity) that the wrongdoer might enjoy here. Under both of our two main proposals the wrongdoer would have available to him only one set of substantive defences, not two as he has under the existing double actionability rule.

4. Damages

6.16 We propose no change in the present rule whereby the applicable law in tort and delict determines what heads of damage are available and the measure or quantification of damages under those heads is governed by the lex fori. Under our proposals for reform of our choice of law rule, the heads of damage available might not be the same as would be available under the lex fori. However, a court in the United Kingdom would not allow recovery under a particular head of damage if to do so would be contrary to public policy - such as, for example, in the case of some (but not all) types of penal damages.[609]

6.17 One question which may arise is that a court in the United Kingdom might be faced with assessing the quantum of damages under a head of damage unknown to its lex fori.[610] Our provisional view is that no express guidance need be given in any implementing legislation on how damages are to be quantified in such a case. We expect the question to

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609 The remedy of multiple damages under some foreign anti-trust legislation is discussed above at para. 5.63.

610 This is not the same problem as that which arises when the court at the forum is able to recognise the claimant's right but has no appropriate remedy at its disposal. In such a case the claimant's action will not succeed: see Phrantzes v. Argenti [1960] 2 Q.B. 19.

arise very infrequently, and its context cannot be foreseen. To seek to resolve such a problem in advance is in our view more likely to result in injustice than would be the case if the court were left to resolve the question on the particular facts of the dispute before it. If the problem should arise it would be little different from that which arises on those occasions when our own internal law is extended to cover new heads of damage. Comments are invited.

5. Limitations on recovery

6.18 This issue has given rise to some difficulty in practice, particularly in relation to wrongful death actions in the United States. Where the applicable law in tort or delict imposes a statutory ceiling on liability, the question arises whether the forum should follow or depart from the applicable law in this respect.

6.19 The United States practice does not appear to be uniform. The issue has been treated as one in tort, and hence governed (under the choice of law rule in tort which then prevailed there) by the lex loci delicti;[611] but also as procedural or as a matter of public policy, and hence governed by the lex fori.[612] Under the flexible choice of law rules which have been applied more recently in tort cases in the United States, the issue has not been separately classified.[613]

6.20 Our view, upon which comments are invited, is that classification of a statutory ceiling on liability as procedural would be hard to defend; and that once it is classified as substantive, such a ceiling would fall to be governed by the applicable law under our choice of law

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611 Loucks v. Standard Oil Co. of New York 120 N.E. 198 (1918).

612 Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961); [1961] 2 Lloyd's Rep. 406.

613 Reich v. Purcell 432 P. 2d 727 (1967).

rule in tort and delict,[614] especially since in any one system of law a limitation on recovery may be set at a level which takes into account how easy it is for the claimant to establish the liability of the wrongdoer. For example, if it is easy to establish liability the limitation on recovery may be correspondingly low. In such a case it would be inappropriate to apply the substantive law relating to liability without the corresponding balancing provision.[615] In common with all our other proposals this proposal is, of course, subject to public policy and to any overriding statutory provision which a court at the forum would be bound to apply. The quantification of damages within the limit would remain a matter for the lex fori.

6. Prescription and limitation of actions

6.21 This matter will be regulated in England and Wales by the Foreign Limitation Periods Act 1984 when that Act is brought into force,[616] although the adoption of a choice of law rule in tort and delict which did not have a requirement of double actionability would render section 1(2) of the Act superfluous.[617] The matter is now regulated in Scotland by section 4 of the Prescription and Limitation (Scotland) Act 1984.[618] Both Acts provide in general for the application of the prescription or limitation period of the system of law chosen by the

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614 This conclusion is that of Morse: pp. 200-202. See also Dicey and Morris, p. 962. Cf. Ehrenzweig, A Treatise on the Conflict of Laws (1962), pp. 552-556.

615 See, more generally, para. 6.77 below.

616 The Act follows the recommendations of the Law Commission: Classification of Limitation in Private International Law (1982), Law Com. No. 114, Cmnd. 8570.

617 Section 1(2) was inserted to deal with the existing double actionability rule in Phillips v. Eyre: (1982) Law Com. No. 114, paras. 4.14 - 4.17, and para. 2 of the explanatory notes to clause 1 of the appended draft Bill.

618 The Act (which came into force on 26 September 1984) follows the recommendations of the Scottish Law Commission: Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions (1983), Scot. Law Com. No. 74, (1982-83) H.C. 153.

appropriate choice of law rule. It is intended that the law of Northern Ireland should be to like effect.[619] In our view this matter does not, therefore, require further consideration here.

7. Transmission of claims on death: the survival of actions

6.22 The questions which we consider in this section arise in two situations. The first is where a potential claimant dies: the question then is whether his claim may be pursued by his estate. This category concerns the "active transmission" of claims. The second is where a wrongdoer dies: may the claimant then sue the wrongdoer's estate? This category concerns the "passive transmission" of claims.

6.23 It does not seem tenable to us to suggest that the question whether a right of action may survive the death of the potential claimant or of the wrongdoer should be regarded as procedural.[620] However, even viewed as an issue of substance, different opinions have been expressed about what law should govern this question.

(a) Substantive questions

(i) Active transmission

6.24 Two questions may arise in this context. The first is simply whether or not an action which could have been brought by a deceased claimant may be brought by his estate after his death. The second question is as to who will benefit from such an action. It is the first question only which we consider here. The question as to who will benefit from an action pursued by the estate of the deceased must be a matter for the law governing succession to his estate.[621]

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619 See n. 152 above.

620 Although the issue was so classified in Grant v. McAuliffe 264 P. 2d 944 (1953), this has subsequently been regretted by Traynor J. (as he then was), the author of the majority opinion: see, e.g., (1976) 25 I.C.L.Q. 121, 143-144.

621 Morse, p. 147.

6.25 It has, however, been suggested that the first question (namely whether or not an action survives the death of the potential claimant) should also be regarded, not as an issue in tort or delict, but rather as a question of administration or succession, to be governed by the law applicable to the administration of the moveable estate of the deceased or by his lex domicilii (which will usually, though not necessarily, be the same).[622]

6.26 On the other hand, there is also support for referring the issue to the applicable law in tort or delict,[623] and this solution has been adopted by the Restatement Second[624] and in a number of international conventions.[625] It is the solution which we provisionally support.

6.27 This issue exemplifies an attempt to escape from the unpopular consequences of a rigid choice of law rule in tort and delict by

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622 It is not always entirely clear whether the matter is seen as a question of administration or of succession, but the following support one or the other: Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633; Strömholm, Torts in the Conflict of Laws (1961), p. 185. For Dicey and Morris (pp. 956-957) and for Kahn-Freund (p. 111, n. 81) it is a question of administration. See also Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1, 30.

623 Hancock, Torts in the Conflict of Laws (1942), p. 247; Morse, p. 147; Sykes and Pryles, Australian Private International Law (1979), pp. 133-134 (where the Dicey and Morris view is expressly criticised); Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 112-113. The reason given by Hancock for preferring the applicable law in tort over the lex domicilii (namely that the defendant could alter the plaintiff's rights by changing his domicile after the harm had been done) seems less than convincing.

624 Section 167.

625 Hague Traffic Accidents Convention, article 8(5); Hague Products Liability Convention, article 8(5); E.E.C. Draft Convention, article 11(5).

reclassifying the issue as belonging to another category;[626] but we believe that the issue of the transmissibility of claims on death is not one that logically belongs exclusively in one category or another. There may at first sight appear to be a number of competing interests involved. In so far as the old common law (which prohibited both active and passive transmission) can be said to have had a policy,[627] it may have been that the heirs of the wrongdoer should not suffer because of what he did,[628] but this argument cannot apply where it is the party wronged who has died. The size of the estate of the deceased is of some concern to the beneficiaries under his will or intestacy, and those who support the application of the law governing the administration or of the lex domicilii look to the interests of the beneficiaries; but the argument that "[i]n enacting any survival statute a legislature is most concerned with the assets and liabilities of the estates of its domiciliaries"[629] does not seem entirely convincing. On the contrary, the primary aim would seem to have been to secure compensation for the victims of torts or delicts.[630] An examination of the interests involved seems to show that the survival of an action in tort or delict has today much to do with compensation for persons injured by the wrongdoer (or for their estates) and relatively little to do with succession or administration.

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626 See, e.g., Webb and Brownlie, (1965) 14 I.C.L.Q. 1, 30: "... it is desirable on the grounds of convenience to remove the question of survivability for the purposes of English litigation from the tentacles of the Rule in Phillips v. Eyre"; and see Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633.

627 See above, n. 347.

628 Currie, Selected Essays on the Conflict of Laws (1963), p. 144.

629 Note, "Survival Statutes in the Conflict of Laws", (1955) 68 Harv. L.R. 1260, 1266.

630 This certainly seems to have been the object of the English survival legislation, which is contained in section 1 of the Law Reform (Miscellaneous Provisions) Act 1934: see the first Interim Report of the Law Revision Committee, (1934), Cmd. 4540; Hansard (H.L.), 2 May 1934, vol. 91, cols. 988-995; Hansard (H.C.), 15 June 1934, vol. 290, cols. 2111-2122; and see also Currie, Selected Essays on the Conflict of Laws (1963), p. 143.

6.28 In addition to the arguments in favour of treating the issue as one in tort or delict, there are also arguments against applying the lex domicilii or the law governing the administration of the deceased's estate. To apply the lex domicilii (the law governing succession to the movable estate of the deceased) suffers, in our view, from a number of drawbacks. First, the distribution of the estate of the deceased is different from its collection, but it is with collection that the transmission of claims would seem to be more closely connected.[631] Secondly, the lex domicilii bears no necessary or even likely relation to the circumstances of the tort or delict. Thirdly, to apply the lex domicilii to the question of transmission of claims in the case of a foreign tort or delict would logically require the application of the lex domicilii in the case of the transmission of all other claims for damages of whatever nature and wherever arising, because the rationale of the lex domicilii solution is of universal application.

6.29 The above arguments apply equally to the suggestion that the question should be determined according to the law governing the administration of the deceased's estate. Further, whereas a person can have only one domicile, his estate may be the subject of any number of administrations in different countries. Which administration is to determine the issue of survival of actions? It is suggested by the editors of Dicey and Morris that the law governing the "principal administration" should apply.[632] It is not clear, however, how the "principal administration" is to be identified, or what is to happen if its identity changes from time to time. This solution appears to us to be as unsatisfactory as applying the lex domicilii.

6.30 Either of our proposed choice of law rules should in our view be able to produce an appropriate result in cases where the lex loci delicti would seem to require displacement in favour of the law of some other

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631 See Dicey and Morris, p. 956; Morse, pp. 146-147.

632 Dicey and Morris, p. 956.

place more closely connected with the occurrence and the parties.[633] Our provisional conclusion, therefore, is that the question whether or not a claim may survive for the benefit of a deceased claimant's estate should be treated as an issue in tort or delict, to which our choice of law rule in tort and delict would apply. Comments are invited.

(ii) Passive transmission

6.31 The question which arises here is whether a claimant may pursue an action in tort or delict against the estate of the wrongdoer after the wrongdoer has died. It has been suggested that here also the applicable law should be that governing the administration of or succession to the estate of the deceased;[634] and, again, there is also support for applying the law governing issues in tort and delict.[635]

6.32 Our view is that the arguments which we have advanced in the context of active transmission apply equally to cases of passive transmission, and our provisional conclusion is therefore that our choice of law rule in tort and delict should also apply to this question. Comments are invited.

(iii) Death of either claimant or wrongdoer after action has begun

6.33 A problem may arise if a party dies between the commencement of proceedings and judgment in an action in a court in the United Kingdom based on an applicable law which does not permit the transmission of the claim in issue. Our provisional conclusion is that

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633 For example, in Grant v. McAuliffe 264 P. 2d 944 (1953) and McElroy v. McAllister 1949 S.C. 110 almost every factor in the case pointed to one place, which was also, as it happened, the forum. See Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1, 19-21, 29.

634 Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633; Dicey and Morris, pp. 959-960; Kahn-Freund, pp. 110-112; Strömholm, Torts in the Conflict of Laws (1961), p. 185. See also Grant v. McAuliffe 264 P. 2d 944 (1953).

635 Hancock, Torts in the Conflict of Laws (1942), p. 245; Morse, p. 163; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 112-113.

whether or not the claim subsists is a substantive question[636] which should be treated in the same way as transmission of a claim before proceedings are commenced.[637] Our procedural machinery for the substitution of parties[638] would therefore operate only if the cause of action subsisted under the law appropriate to determine that question. Comments are invited.

(b) Procedural questions

6.34 The machinery by which the foreign estate of a deceased person is administered will of course depend upon the law governing the administration; but in an action in the United Kingdom one particular question which may arise is whether a person suing on behalf of the deceased's estate should be required to take out a grant of representation[639] at the forum, irrespective of whether or not he has complied or is required to comply with any corresponding requirement under a foreign law. Our provisional conclusions are (a) that a grant of representation at the forum should be required, in accordance with the general rule, on the ground that protection is thus afforded for local creditors of the deceased's estate;[640] and (b) that it is irrelevant whether or not the the person suing has been or is required to be so appointed anywhere else. This probably represents the present law, at least in England and Wales.[641]

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636 There is, however, support in the United States for the proposition that this question is procedural only: see Leflar, American Conflicts Law (3rd ed., 1977), p. 272, n. 4.

637 Cf. Orr v. Ahern 139 A. 691, 692-693 (1928); Restatement Second, s.167, comment d.

638 In England and Wales: R.S.C., O.15, r.7; in Northern Ireland: R.S.C. (N.I.) 1980, O.15, r.7; in Scotland: R.C. 106, Sheriff Court Ordinary Cause Rules, rule 60.

639 By this expression we mean in England and Wales and in Northern Ireland, grant of probate or letters of administration; in Scotland, the issue of confirmation.

640 Dicey and Morris, pp. 603, 954-955; Morse, pp. 143-144; Restatement Second, s.180, comment b.

641 See above, para. 2.63.

Comments are invited on this point, as also on any other procedural implications of our proposals.

8. Wrongful death

(a) Substantive questions

6.35 It does not appear to be controversial that the existence of an action for wrongful death, and the description of those for whose benefit it exists, are matters which cannot be classified as procedural and which should be governed by the applicable law in tort or delict, and we so propose.[642] This appears to be the approach of the present law.[643] Although this issue is another which courts have on occasion classified differently in order to avoid a rigid choice of law rule in tort,[644] there is in our view no reason why this should be necessary if the choice of law rule in tort and delict can be relied upon to produce appropriate results.

6.36 A potential difficulty with this approach has been mentioned already, albeit in slightly different guise, under the heading of vicarious liability:[645] the choice of law rule as applied to the wrongful death action might appear to point to a law different from that which would be indicated in an action by the deceased's estate against the same wrongdoer, and might even point to different laws for different beneficiaries in the wrongful death action. The reason for this is that since both of our proposed choice of law rules will be able to take into account not only the occurrence but also the parties, the same choice of law rule may produce different results in separate actions based on the same occurrence but with different parties.

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642 This view is supported by Kahn-Freund, p. 118, and by Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113; and is not dissented from by Dicey and Morris, pp. 954-955 or by Morse, p. 143.

643 See above, paras. 2.67 - 2.76.

644 See, for example, Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961); [1961] 2 Lloyd's Rep. 406.

645 See above, para. 6.10.

6.37 Our provisional conclusion is that the applicable law in a wrongful death action should be that which would have been applied in an action by the deceased or his estate against the wrongdoer. We invite views on this point, as also on our main proposal in this area.

(b) Procedural questions

6.38 As in the case of survival of actions discussed above,[646] it would be necessary to ensure that the machinery of our own domestic court procedure made adequate provision for a person entitled to sue under a foreign wrongful death statute to pursue an action in a court in the United Kingdom.

6.39 Where the claimant here is suing on behalf of the deceased's estate, our provisional conclusion is that (as in the case of survival of actions) the claimant should be required to take out a grant of representation[647] at the forum, but that any corresponding requirement under the law governing the wrongful death claim or any other foreign law may be regarded as procedural only and therefore ignored by a court in the United Kingdom.[648] However, some actions for wrongful death are brought, not on behalf of the deceased's estate, but for the benefit of certain specified persons, usually relatives. Where, as in Scotland, such persons sue directly in their own names, the question of representation does not arise. Where the action, although for the benefit of individuals and not the estate, is brought by and in the name of the executor or administrator, as is usually the case under the Fatal Accidents Act 1976, we do not believe that it should be necessary for the person bringing the action to obtain a grant of representation at the forum. Such a person is merely an agent for those who benefit by the wrongful death action. He

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646 Para. 6.34.

647 See n. 639 above.

648 This is, however, not the approach of the Restatement Second, ss. 180, 314, 315.

does not act as personal representative of the deceased (even though that is what he may in fact also be),[649] and the reason for insisting on a grant of representation at the forum before a personal representative appointed abroad may bring an action at the forum does not apply.[650]

9. Intra-family immunities

(a) Husband and wife

6.40 While there would appear to be general agreement that the issue of interspousal immunity should be regarded as substantive rather than as procedural,[651] there is a body of opinion to the effect that such immunities have nothing to do with the law of tort or delict, and are better considered as matters of domestic relations, which should be governed by the law of the parties' domicile.[652] This approach has been supported in both Australia[653] and the United States.[654] The alternative view is that the issue should be regarded as one in tort or delict and

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649 Byrn v. Paterson Steamships Ltd, [1936] 3 D.L.R. 111; Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 442-443.

650 Dicey and Morris, pp. 603, 954-955; Morse, pp. 143-144; Restatement Second, s.180, comment b.

651 Dicey and Morris, p. 959; Hancock, Torts in the Conflict of Laws (1942), p. 236; Kahn-Freund, p. 66. Cf. Graveson, Conflict of Laws (7th ed., 1974), p. 594.

652 Dicey and Morris, pp. 958-959; Hancock, Torts in the Conflict of Laws (1942), pp. 235-236 (but cf. (1962) 29 U. Chi. L.R. 237); Kahn-Freund, p. 66; Nygh, Conflict of Laws in Australia (3rd ed., 1976), p. 182.

653 Warren v. Warren [1972] Qd. R. 386 (as one of two alternative grounds).

654 Haumschild v. Continental Casualty Co. 95 N.W. 2d 814 (1959)(now superseded by Zelinger v. State Sand and Gravel Co. 38 Wis. 2d 98, 156 N.W. 2d 466 (1968)).

should be regulated by the choice of law rule in tort and delict.[655] This approach is again supported by authority in Australia;[656] on the facts, however, the choice of law rules in tort which were applied resulted in the selection of the lex domicilii, and the more recent approaches in the United States have produced the same result.[657]

6.41 The reasons advanced in favour of treating the issue as one of family law refer to the policy behind the existence of interspousal immunity. While originally it was presumably a manifestation of the fictional unity of husband and wife, and was also closely connected with the law relating to matrimonial property,[658] different rationalisations have now emerged. The purpose of the immunity has been said to be "to pacify quarrelling couples by drawing the curtain of privacy over unfortunate behavior",[659] and thus to preserve domestic harmony. Alternatively, the immunity might be based upon "a judicial belief that litigation of a certain type between spouses would tend to undermine the community's ideals and detract from the dignity of its courts",[660] or upon the view that "these wife versus husband lawsuits are not genuine adversary proceedings at all but juristic caricatures in which the so-called defendant, because he stands to gain by losing, cooperates with his adversary instead of his insurer who is supposed to be trying to defend him".[661] However, as has been pointed out,[662] the last two of these

655 Morse, p. 158; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113. This approach is adopted by the Restatement Second (s. 169), where it is, however, conceded that the lex domicilii will usually apply: s. 169 (2).

656 Warren v. Warren [1972] Qd. R. 386 (as the other of the two alternative grounds); Corcoran v. Corcoran [1974] V.R. 164.

657 Thompson v. Thompson 193 A. 2d.439 (1963); Johnson v. Johnson 216 A. 2d 781 (1966).

658 See Dicey and Morris, p. 959; Kahn-Freund, p. 66.

659 Hancock, (1962) 29 U. Chi. L.R. 237, 244.

660 Ibid.

661 Ibid., 271.

662 Ibid., 244.

reasons are the concern of the forum alone, and in the United Kingdom such actions are permitted despite these two arguments against them.[663] Doubt has also been cast on the validity of the first reason.[664]

6.42 There are also practical arguments against applying the lex domicilii. First, the lex domicilii may be entirely unconnected with the circumstances of the tort or delict. Secondly, there may be no common domicile at all, and the same is true of the alternative to the lex domicilii, namely the law of the spouses' habitual residence, or the "central location of the family relationship".[665] If there is no such place, its law cannot determine the issue, and it will be necessary to fall back on another rule. Further, even if there is such a place, it is not easy to decide on policy grounds what significance should be accorded to a change in the common domicile or habitual residence between the time when the cause of action arose and the time of trial.

6.43 The core of the argument in favour of deciding the issue of immunity according to a law that is connected with the incidence of family obligations is that family relationships are the concern of that law and of no other. However, it is possible to be sympathetic both towards this view, and also towards the view that "... it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home",[666] (even if it is agreed that only family relationships should be immune

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663 Indeed, the Law Reform Committee, in its Ninth Report (1961) Cmnd. 1268, did not raise the third argument and referred only tangentially to the second.

664 See Emery v. Emery 289 P. 2d 218, 224 (1955); Balts v. Balts 142 N.W. 2d 66, 73 (1966). Although both of these cases concerned parent-child immunity, the argument used is equally applicable to the case of husband and wife. See also Ehrenzweig, A Treatise on the Conflict of Laws, (1962), s. 221.

665 Morse, p. 158; and see Nygh, Conflict of Laws in Australia (3rd ed., 1976), p. 182.

666 Emery v. Emery 289 P. 2d 218, 223 (1955).

from such change) without necessarily accepting unreservedly the application to such matters of the lex domicilii, or some law other than the law applicable to issues in tort or delict. It is suggested that this issue provides yet another example of an attempted escape from a rigid choice of law rule by means of re-classification. By contrast, we envisage that under both of our proposed choice of law rules in tort and delict the lex loci delicti could be displaced in favour of (for example) the law of a country which was also that of the common domicile or habitual residence, if it were appropriate to do so; but this may not be so in every case.

6.44 Our provisional conclusion is, therefore, that there would be disadvantages in tying the issue of interspousal immunity rigidly to the parties' common domicile or habitual residence, and that it would be preferable to apply the choice of law rule in tort and delict to this issue. Comments are invited on this view.

(b) Parent and Child

6.45 Although there is both opinion[667] and United States authority[668] in favour of applying the law of the parent's (and hence, usually, the child's) domicile to this question, it appears also to be agreed,[669] and it is here suggested, that the issues involved are substantially the same as those discussed in connection with interspousal immunity. Our provisional conclusion is, therefore, that this question also would be better governed by the choice of law rule in tort and delict.[670]

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667 Dicey and Morris, p. 959; Ehrenzweig, A Treatise on the Conflict of Laws (1962), s. 221; Kahn-Freund, p. 67.

668 Emery v. Emery 289 P. 2d 218 (1955); but see Balts v. Balts 142 N.W. 2d 66 (1966), where it does not appear clear that the lex domicilii was applied as such: ibid., at 69-70.

669 Dicey and Morris, p. 959; Ehrenzweig, A Treatise on the Conflict of Laws (1962), s.221; Kahn-Freund, p. 67; Morse, pp. 155-158.

670 This approach corresponds with that of Morse (pp. 155-158) and of the Restatement Second (s. 169).

10. Contribution

6.46 The existence of a right to contribution is, we believe, not properly classified as delictual. It is dependent, not upon any relationship with the victim of a tort or delict, but rather upon an obligation between two people, neither of whom has committed a tort or delict against the other. "For if A is injured by the joint negligence of B and C, and recovers judgment against B, B and C have each committed a tort against A, but C has not committed a tort against B. Hence B's right of contribution from C cannot be delictual."[671] Even clearer is the case where, in the example above, C has not committed a tort or delict against A, but is in breach of another type of obligation to him (for example, C is in breach of his contract with A). In such a case, not only has C not committed a tort or delict against B, he has not committed a tort or delict at all. A right to contribution may nevertheless exist.[672]

6.47 The fact that an issue cannot be classified as delictual does not mean that the choice of law rule in tort or delict should not nevertheless apply to it. However, we do not believe it to be necessary in principle or in practice that the rights inter se of two wrongdoers, or a wrongdoer and a third party, should be determined according to the same law as applies in the claimant's action in tort or delict. Where the claim for contribution is based upon an actual contract, it would in our view be wholly inappropriate to use the choice of law rule in tort and delict to select the applicable law; and it would in our view be equally inappropriate to do so where the claim for contribution was made against a person who had committed no tort or delict. More generally, there appears to be widespread agreement that the question of contribution can (and should) be separated from the tort or delict upon which the claim for

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671 Dicey and Morris, p. 967.

672 The present English law, for example, provides for a right of contribution in such circumstances: Civil Liability (Contribution) Act 1978, ss.1(1), 6(1).

contribution is based; and that, in the absence of an actual contract, a claim for contribution should be regarded as quasi-contractual (or sui generis) and governed by the choice of law rule appropriate to restitutionary obligations.[673]

6.48 It may, of course, be that the system of law most appropriate to govern the question of contribution will, not infrequently, turn out to be the same as the applicable law in tort or delict; and it would no doubt be convenient if this were so. But we are not confident that such coincidence could be relied upon in a sufficiently large proportion of cases to make it acceptable that the choice of law rule in tort and delict should always apply to the issue.

6.49 One problem with applying the choice of law rule in contract or in quasi-contract (as appropriate) to questions of contribution is that, although our choice of law rule in contract is clear enough, our choice of law rule in quasi-contract is not at all certain.[674] Nevertheless, our provisional conclusion, upon which comments are invited, is that for the reasons above stated the choice of law rule in tort and delict should not apply to the issue of contribution. If (as appears likely) this represents the present law,[675] no new uncertainty would be introduced into the law by adopting this proposal. Views are also invited as to whether any implementing legislation should expressly provide that questions of contribution are not governed by our choice of law rule in tort and delict.

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673 Dicey and Morris, p. 967, and see Rule 170; Graveson, Conflict of Laws (7th ed., 1974), p. 614; Leflar, American Conflicts Law (3rd ed., 1977), p. 274; Morse, p. 209; Wade, "Joint Tortfeasors and the Conflict of Laws", (1953) 6 Vand. L.R. 464, 472-478. Cf. Restatement Second, s. 173; and Ehrenzweig, A Treatise on the Conflict of Laws (1962), s.225.

674 As to the choice of law rule in quasi-contract, see Anton, pp. 234-235; Dicey and Morris, ch. 30 and p. 967.

675 See above, paras. 2.82 - 2.84.

11. Indemnity

6.50 For the same reasons as applied to the question of contribution (discussed in the immediately preceding paragraphs) we have reached the provisional conclusion that a right of indemnity which may exist between the wrongdoer and some other person cannot be regarded as a delictual obligation, and that the choice of law rule in tort and delict should not be applied to this issue.[676] A right of indemnity may, for example, be contractual or quasi-contractual, and the choice of law rule in contract or quasi-contract would accordingly apply. Comments are invited.

12. Tort or delict and contract

(a) Contractual defences to claims in tort or delict

6.51 We have suggested above, at paragraph 2.97, that the present law on the inter-relationship of a claim in tort or delict and a contractual defence may be that -

(i) the interpretation and validity of the contractual term are matters of contract, to be decided by the appropriate law; but that

(ii) the effect of the contractual term (if valid), as so interpreted, as a defence to a claim in tort or delict, is to be decided by the applicable law in tort or delict.

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676 This view is supported by Dicey and Morris, pp. 967-968; and Morse, p. 209. See also Leflar, American Conflicts Law (3rd ed., 1977), p. 274. The Restatement Second, however, treats the issue as one in tort (s.173), unless the right to indemnity is contractual (s.173, comment b).

However, whether or not this is in fact the present law, we have reached the provisional conclusion that it is the approach which should be adopted.[677] Comments are invited.

6.52 There is, however, a hidden difficulty in this approach: namely that of deciding whose rules of private international law shall select the law by which the contract should be governed. It would be possible to decide this question according to our own principles in every case: that is, the contract would be governed by its proper law, chosen according to English, Scottish or Northern Ireland principles, and its validity and construction decided accordingly.[678] The opposite view is that the choice of law rules of the country whose law has been selected as the applicable law in tort or delict should be used in order to decide what law governs the contract.[679]

6.53 To use the English, Scottish or Northern Ireland (as the case may be) choice of law rules in contract has the apparently obvious merit of simplicity and convenience. It is for consideration, however, whether the application of a foreign rule would in fact be significantly less simple or convenient; and, further, the application of our own rule means that

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677 The approach here suggested is supported by a number of commentators: see Cheshire and North, p. 283; Kahn-Freund, pp. 141-149; Morse, p. 188 (but cf. p. 194); North, "Contract as a tort defence in the conflict of laws", (1977) 26 I.C.L.Q. 914; see also Collins, "Exemption clauses, employment contracts and the conflict of laws", (1972) 21 I.C.L.Q. 320, 334. Cf. Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), pp. 293-294. The view of the editors of Dicey and Morris (at pp. 963-964) is not entirely clear. Our conclusion is contrary to that reached by Lord Denning M.R. in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176, 1181: see above, para. 2.42.

678 This solution is favoured by Morse, at p. 191 (in the context of the second limb of the rule in Phillips v. Eyre): "To do otherwise would be to introduce an indefensible extension of the doctrine of renvoi in an area where it should have no part to play." See also Collins, "Interaction between contract and tort in the conflict of laws", (1967) 16 I.C.L.Q. 103, 115.

679 North, (1977) 26 I.C.L.Q. 914, 927, again in the context of the second limb of the rule in Phillips v. Eyre.

there must exist a risk that the English, Scottish or Northern Ireland court would reach conclusions about the contract different from those which would have been reached if the court had applied the choice of law rules of the country whose law has been selected as the applicable law in tort or delict,[680] although it may perhaps be that this risk is small. Our provisional conclusion is, nevertheless, that our own contract choice of law rules should be used, but comments are invited on this view.

(b) Releases, assignments or assignations, and other post-event transactions

6.54 It has been suggested that the principles outlined above should apply also to contractual releases from claims in tort or delict,[681] and to assignments or assignations of delictual claims.[682] The same principles could be extended to all arrangements between the parties after the tort or delict had occurred and which would affect their rights and liabilities. On this view, it would be for the law governing the tort or delict to decide whether, to what extent, under what conditions and subject to what requirements such releases, assignments or assignations, or other arrangements were permissible; but it would be for the law governing the release, assignment or assignation, or other arrangement to decide questions of the interpretation or validity of the particular instrument or transaction in issue. There would appear to be no reason for departing from this approach when considering the effect of a release or a covenant not to sue given to one wrongdoer upon the liability of others.[683]

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680 Ibid. This is not the only occasion upon which a similar risk exists. Another arises before this stage has been reached, namely the initial classification of a defence as delictual or contractual; and it seems to be the general view that our court will have to make up its own mind about this in accordance with the lex fori. See Dicey and Morris, p. 963; Kahn-Freund, p. 146; Collins, (1967) 16 I.C.L.Q. 103, 115-116.

681 North, (1977) 26 I.C.L.Q. 914, 927-931, and see Morse, p. 210.

682 Dicey and Morris, p. 957; Morse, pp. 147-148. Cf. Hancock, Torts in the Conflict of Laws (1942), p. 203; Kahn-Freund, p. 118.

683 The Restatement Second treats this as an issue in tort: s. 170.

However, where it was relevant under the applicable law in tort or delict whether the instrument in question was, on the one hand, a release, or, on the other, a covenant not to sue, the question would arise whether this point should be decided according to the applicable law in tort and delict or the law governing the instrument, in so far as the question was not purely one of construction. Our view is that this point concerns the nature and meaning of the instrument, and that the question should therefore be determined according to the law governing the instrument.[684]

6.55 There is, however, also a case for suggesting that a release or other arrangement which is arrived at after a tort or delict has occurred should be regarded differently from an antecedent contract. In the latter case the question is the extent to which the outcome of an action in tort or delict should be affected by a prior agreement between the parties in circumstances where the law appropriate to govern the tort or delict is inconsistent with the agreement, and we have suggested that it is the law applicable to the tort or delict which should determine the effect of the agreement on the claim in tort or delict. However, where the issue is, for example, the settlement or release of a claim, in full knowledge of the circumstances, it is arguable that if the parties are able to reach an agreement which is valid by its proper law, the agreement should in principle be upheld, and that there is no reason of policy which would require the effect of the agreement to be governed by the applicable law in tort and delict (which would, therefore, not need to be determined). A release or settlement may, on this view, be regarded purely as a matter of contract, and the fact that the original cause of action was in tort and delict may be seen as irrelevant. The same arguments apply, more generally, to all arrangements between the parties.

6.56 This view may derive support from our proposal that the parties to an action on a foreign tort or delict should be allowed by means of contract to choose the applicable law. If the effect of a release,

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684 The Restatement Second treats this issue also as one in tort: s. 170(2).

settlement or other arrangement were determined only by its own governing law, the applicable law in tort or delict would be irrelevant. However, if the effect of the arrangement were governed by the applicable law in tort or delict, the parties could ensure that their agreement was effective merely by agreeing further what the applicable law in tort and delict was to be. They could, for example, agree that the proper law of the contract was to govern the tort or delict as well. If this device was all that would be required to make the parties' agreement effective, it is arguable that to make it necessary would be an excessive devotion to form at the expense of substance.

6.57 Nevertheless, we have reached the provisional conclusion that agreements and arrangements transacted after the tort or delict had occurred (including releases, settlements, and assignments or assignations) should for reasons of convenience be treated in the same way as antecedent contracts, and that their effect should therefore be determined by the applicable law in tort or delict. Comments are, however, invited on this conclusion. If post-event transactions were to be treated differently from antecedent contracts, our proposal would be that all such transactions (including, for example, waivers and assignments or assignations of delictual claims) should be treated in the same way.

(c) Concurrent classifications

6.58 As we have observed above,[685] under our law as it stands at present, a person who has suffered a wrong which may be both a breach of contract and a tort or delict may choose whether to frame his claim in contract, or in tort or delict, or both.[686] However, this is not true in some jurisdictions, such as France, where the existence of a claim in contract means that no claim in delict may be brought.[687] At present this

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685 Paras. 2.87 - 2.88.

686 Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

687 See Kahn-Freund, pp. 130-134; H. & L. Mazeaud and Tunc, Responsabilité Civile, Vol. 1 (6th ed., 1965), paras. 173-207.

would probably cause no problem in an action in England and Wales or in Northern Ireland, for the only "foreign" requirement under the existing state of the rule in Phillips v. Eyre is that the wrong complained of should give rise to civil liability at the place of the wrong, and contractual liability may well be sufficient.[688] In Scotland, however, the rule in McElroy v. McAllister seems to require that the wrong should be actionable as a delict under the lex loci delicti. If that is correct, an action founded on delict would not succeed before a Scottish court on the basis only of contractual liability at the place of the wrong.[689]

6.59 Under our reformed choice of law rule a claimant in the United Kingdom who had the option of framing his claim in terms of tort or delict or of contract might choose the former, frame his claim in terms of tort or delict, and then find that the applicable law proved to be (for example) French law. The court would then have to decide whether or not to apply the French rule, which would prohibit an action in tort or delict. If the rule were held to apply, it might be that the claimant's action would not succeed as formulated, and that he would have to reformulate his claim in terms of contract.[690]

6.60 We have reached the provisional conclusion that this phenomenon should not in fact create any peculiar problems except one. A problem might in theory arise if the claimant, having been forced to sue in contract instead of in tort or delict, found that by the proper law of the contract the rule was the reverse of the French rule, and was that contractual claims were excluded if there was a delictual claim. Whether this could ever occur in practice is not known. We invite comment on whether or not it might; and, if it might, on whether or not the possibility should be provided for in any implementing legislation, and on what solution should be adopted.

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688 See above, para. 2.17.

689 See above, para. 2.42.

690 The French rule was discussed in The Sindh [1975] 1 Lloyd's Rep. 372, but the decision does not appear to illuminate the matters here raised.

13. Direct action by third party against insurer

6.61 The possibility of a direct action against an insurer by the victim of a wrong presents one of the most intractable problems in the field of choice of law in tort and delict, for the wrong has not been perpetrated by the insurer, and the insurer may not be in a contractual relationship with the third party. Nevertheless, even if the action is neither an action in tort or delict nor an action in contract, this would not preclude the application to such an action of the choice of law rule in tort and delict or that in contract. The direct action could, however, be said to be quasi-contractual in nature and therefore subject to the appropriate choice of law rule; or it could be regarded as a statutory cause of action which does not fit within any traditional category.[691] In any event it seems clear that the direct action cannot be said to be merely procedural.[692]

6.62 There is a body of opinion to the effect that the possibility of a direct action should be governed by the applicable law in tort and delict,[693] and this view is supported by some authority in Australia.[694] It also seems to be the solution adopted in France.[695] The main alternative

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691 It has also been suggested that the insurer's liability could be classified as a debt, situated at the domicile of the debtor and subject to the laws prevailing there: Strömholm, Torts in the Conflict of Laws (1961), p. 165.

692 Although the contrary conclusion has been reached in some United States decisions: see Leflar, American Conflicts Law (3rd ed., 1977), p. 243, n. 19.

693 Morse, p. 166; Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), pp. 264-265; and see Strömholm, Torts in the Conflict of Laws (1961), p. 184.

694 Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R 143; Ryder v. Hartford Insurance Co. [1977] V.R. 257.

695 Cass. civ. 13.7.1948, D.1948.433 (lex loci delicti did not permit direct action; French direct action statute not applied even though contract of insurance was French). Cf. Trib. Paris 16.6.69, Rev. crit. d.i.p. 1971.67 (accident occurred in Germany but the French direct action statute held to apply because the insurance contract was governed by French law). This decision has been criticised: ibid., at p. 74. See Kahn-Freund, pp. 151-155.

solution is that a direct action should be governed by the proper law of the contract of insurance,[696] which is of course also the law which in any event regulates the liability of the insurer to the insured. This solution has found rather more support in Australia.[697] The United States practice does not appear to be uniform.[698] There does not appear to us to be an unanswerable argument of principle in favour of one or other of these approaches. Any solution must represent a balance between the interests of the claimant, on the other hand, and the interests of the insurer, on the other.

6.63 One argument of principle in favour of applying the law governing the insurance contract to the question of the direct action is that the direct action cannot exist in the absence of a contract of insurance, and that it is most appropriately described as "a statutory extension to contractual liability".[699] This extension of contractual liability operates entirely in favour of the claimant, who is not deprived of his ordinary rights against the wrongdoer, and who therefore receives a bonus which (so the argument runs) should not exist if it is not provided for under the law governing the contract. On the other hand, it may also be argued that no claim at all would exist in the absence of a tort or delict. Since the direct action exists for the purpose of protecting

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696 Advocates of this solution include Beitzke, "Les obligations délictuelles en droit international privé", [1965] II Hague Rec. 65, 128-129; Dicey and Morris, pp. 960-961; Kahn-Freund, p. 155.

697 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122; Hall v. National and General Insurance Co. Ltd. [1967] V.R. 355; Stewart v. Honey (1972) 2 S.A.S.R. 585; Hodge v. Club Motor Insurance Agency Pty. Ltd. (1974) 7 S.A.S.R. 86. See above, para. 2.104.

698 See Kahn-Freund, pp. 155-157; Lüer, (1965) 12 Nederlands Tijdschrift v.i.r. 124, 141-144; Morse, p. 164.

699 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128.

claimants who are the victims of a tort or delict against the risk that it may be impossible to recover against the wrongdoer, it would (so this argument goes) be more appropriate to tie the direct action to the tort or delict, not to the contract, and to decide the issue according to the law selected by the choice of law rule in tort and delict.

6.64 Another argument in favour of applying the law of the insurance contract, and against applying the law governing the tort or delict, is that it would be unfair to expose the insurer to liability under any law other than that which governed the insurance contract, since such liability might not correspond with the insurer's expectations, or might be greater than that contemplated under the law of the contract, especially if the contract itself prohibited direct actions. However, we do not believe this argument to be wholly valid, since in this context (as in every other) the insurer's expectations are not necessarily confined to the law which governs the insurance contract. If the activities of the insured take place in a jurisdiction to which the insurance cover extends, the insurer's expectations might reasonably be expected to include not only the potential liability of the insured under the law of that jurisdiction, but also any potential direct liability.

6.65 It is, however, true that the applicable law in tort or delict under either of our proposed models for reform could be that of a jurisdiction to which the insurance cover did not extend - in other words, the applicable law may not be the lex loci delicti (although we believe that in this context this would be rare in practice). We believe the application of a law other than the lex loci delicti to be appropriate in some circumstances in the context of substantive liability, and our general proposals for reform reflect this. It is arguable that this should also be acceptable where the issue is not substantive liability but merely the existence or not of a direct action. Further, while it is possible that the legal system of the country whose law is selected by our choice of law rule in tort and delict might also provide for a direct action when the lex loci delicti or the proper law of the insurance contract does not, the opposite may also occur: an insurer may find that there is no direct action under the legal system of the country whose law is selected by our

choice of law rule in tort and delict, even though the lex loci delicti or the proper law of the contract does provide for it. The rights inter se of the insurer and the insured would, of course, always be determined by the proper law of the contract.

6.66 A further, and more practical, consideration is the likely construction of the direct action legislation which a court in the United Kingdom may be asked to apply. If the direct action issue were governed by the proper law of the insurance contract, a question could arise whether the direct action legislation so selected extended to torts or delicts which had occurred outside the country whose legislation it was.[700] On the other hand, if our choice of law rule in tort and delict were used, it would usually select the lex loci delicti, and the question could arise whether a direct action provided for under that law extended to foreign insurance contracts.[701] In some cases, our choice of law rule in tort and delict could select a law which was not the lex loci delicti, and here the question could arise whether a direct action provided for under the system of law selected could apply to a case involving a foreign insurance contract and a foreign accident.[702] It would clearly be preferable, other things being equal, that the choice of law rule used to

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700 The Australian cases cited in n. 697 above indicate that the legislation there under consideration did apply to accidents which had occurred abroad, as does the Louisiana direct action statute (Webb v. Zurich Insurance Company 205 So. 2d 398 (1967)). The French direct action, on the other hand, is confined to accidents in France: Cass. civ. 13.7.1948, D.1948.433 (although Trib. Paris 16.6.69, Rev. crit. d.i.p. 1971.67 is to the contrary).

701 The Australian legislation would not so apply, but the Louisiana statute can do so (Watson v. Employers Liability Assurance Corporation Ltd. 348 U.S. 66, 99 L. Ed. 74 (1954)) and so, it appears, can the Wisconsin statute (e.g. Hunker v. Royal Indemnity Co. 204 N.W. 2d. 897 (1973)). The French statute may also apply to a foreign insurance contract: Cass. req. 24.2.1936, S.1936.1.161, D. 1936.1.49.

702 In Esteve v. Allstate Insurance Company 343 So. 2d 353 (1977) it was held that the Louisiana legislation could not apply in these circumstances.

select the law which will apply to the issue of the direct action should tend to select a law which does as a matter of construction apply to the facts of the case. Our tentative view (upon which comments are invited) is that a direct action provided for under the proper law of the insurance contract is more likely to apply to foreign accidents than a direct action provided for under the applicable law in tort or delict is to apply to foreign insurance contracts; and that this particular consideration therefore favours the use of the proper law of the contract to determine the issue, and not the applicable law in tort and delict.

6.67 The question whether to apply the proper law of the contract or the applicable law in tort and delict to the issue of the direct action has been described as an "insoluble dilemma".[703] Although we realise that "no dogmatic solution will satisfy everyone",[704] we have on balance reached the tentative view that, if the issue of direct liability is to be governed by one system of law only, that system should be the proper law of the insurance contract. We invite comments on this view.

6.68 A different solution, which avoids a choice between the two competing candidates, has however been adopted by both the Swiss proposals[705] and the Hague Traffic Accidents Convention.[706] These provide that an action may be brought directly against the insurer if such an action is provided for under either the law applicable to the tort or delict or the law applicable to the contract of insurance.[707] Although

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703 Kahn-Freund, p. 151.

704 Morse, p. 166.

705 Article 137: see Appendix.

706 Article 9.

707 Article 9 of the Hague Traffic Accidents Convention is in fact slightly more complicated than this.

such a scheme involves the possibility that both systems of law referred to may permit the direct action, under the Hague Convention the potentially applicable laws are arranged in order of priority of application, whereby the law governing the contract of insurance appears last. We invite comment on whether a scheme of this kind should in principle be adopted in our own proposals. If it were thought to be desirable, our provisional view is that the order of priority of applicable laws should reverse that of the Hague Convention, so as to apply the proper law of the insurance contract unless it provided for no right of direct action, in which case any direct action provided for by the applicable law in tort and delict could be used.

6.69 Finally, our provisional conclusions must be seen in the light of a potential complication. We have no doubt that a direct action, whichever system of law it is governed by, should be subject to any substantive preconditions to liability which that law imposes.[708] As we have mentioned above,[709] a likely condition is that the insurer will not be liable unless the insured would himself be liable to the claimant. The meaning of this requirement of liability will depend upon the foreign law in question (or, perhaps, upon the construction of the contract of insurance). It may, for example, mean that the liability of the insured should be determined according to the lex loci delicti,[710] and that it would not be necessary that liability should be capable of being established under any other law. However, it might alternatively mean that liability should be capable of being established by action in the

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708 This view has been taken in Australia: Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128-129; Hall v. National and General Insurance Co. Ltd. [1967] V.R. 355, 364; and is also the rule of the Restatement Second: s.162, comment b. A precondition which is regarded as procedural only will, however, be ignored: General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877; 152 E.R. 1061. See Cheshire and North, pp. 702-703; Dicey and Morris, p. 1192.

709 Para. 2.105.

710 As was held in Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R 122, 127.

country of the forum. This latter alternative would involve the use of a choice of law rule in tort and delict to select a system of law by which to determine the liability of the insured to the claimant. The question which then arises is whether the choice of law rule which should be used for this purpose by a court in the United Kingdom is the United Kingdom choice of law rule in tort and delict, or that which would have been used by a court in the country whose direct action legislation is being applied in the United Kingdom.

6.70 The corresponding problem in the context of contractual defences to claims in tort or delict has been discussed above.[711] We there concluded that, in the corresponding situation, our own choice of law rule should for reasons of convenience be used in preference to that of the foreign law. However, in the context of selecting the governing law of a contract, it is in practice unlikely that the two approaches would yield different results. In the tort and delict context, however, it is more likely that the choice of law rules of two different countries would yield different results.

6.71 The more complicated, but in our view analytically correct, solution would be to use the choice of law rule in tort and delict of the country whose direct action legislation was being applied in an action in the United Kingdom. A further argument in favour of this solution is that a right of direct action created by a foreign law should be exercised as far as possible within the limits set by the foreign law. However, this solution could lead to an odd result, since the foreign choice of law rule in tort and delict and our own corresponding rule might well select different laws to determine the liability of the insured to the claimant. In such a case it is possible that the insured might be liable under one such law but not the other. If he was liable under the law selected by the foreign choice of law rule, but not our own, the result would be that in an action in the United Kingdom the claimant could succeed against the insurance company but not against the wrongdoer.

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711 Paras. 6.52 - 6.53.

6.72 Our tentative view is that this result is not sufficiently likely to be worth avoiding by adopting the United Kingdom choice of law rule for all purposes; and that in this context, where the foreign direct action legislation requires the use of a further choice of law rule, the rule used in an action in the United Kingdom should be that which would be used by a court in the foreign country.[712] Comments are invited.

C. DEPECAGE AND THE IMPORTANCE OF THE ISSUE IN THE CASE

6.73 Any one tort or delict case may present a number of different questions which require an answer. Some of these questions may not be issues in tort or delict at all - for example, we have suggested that questions of contribution or indemnity should not be so regarded;[713] procedural questions are always governed by the lex fori; and incidental questions such as the determination of who, as a matter of law, is a person's wife or employer, or who are the heirs of a deceased wrongdoer, are clearly not ones which should be governed by the applicable law in tort or delict. However, even within the confines of tort and delict a single case may raise more than one issue, and the question arises whether our reformed choice of law rule in tort and delict should select a single system of law which would apply to all the substantive issues in tort and delict arising in any one case, or whether the individual tortious or delictual issues in the case should be identified and the choice of law rule in tort and delict applied separately to each. The splitting of issues involved in the latter process is known to Continental lawyers as "dépeçage", and it may result in different tortious or delictual issues in the same case being governed by different systems of law, notwithstanding that the occurrence and the parties are identical, and that the same choice of law rule is applied.

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712 Dicey and Morris appear to take the opposite view, and say that before an insurer could be made liable in an action in England, it would be necessary that the act of the insured should give rise to liability under the rule in Phillips v. Eyre: pp. 960-961.

713 See above, paras. 6.46 - 6.49 and 6.50 respectively.

6.74 By way of example, consider two English students who go for a motoring holiday in a foreign country where (a) there is strict liability for motor accidents, but (b) the transmission of tort or delict claims on death is not permitted. In England, by contrast, liability is for negligence only, and the transmission of tort claims on death is permitted. Both of these issues may be regarded as issues in tort or delict, to which our choice of law rule in tort and delict would accordingly apply. While in the foreign country the passenger in the car is killed in an accident caused, without negligence, by the driver. The driver would be liable under the foreign law, but not under English law, as he had not been negligent. If either English law or the foreign law applied to both issues in an action in England by the estate of the deceased passenger against the driver, the action would not succeed. On the other hand, if the issues were split, it would be possible (for example) to use the choice of law rule in tort and delict in such a way as to apply the foreign law to determine the required standard of liability, and English law to the question of the transmissibility of the deceased victim's action. If this were done the claim of the deceased passenger's estate against the driver would succeed.

6.75 There is clearly some support in Boys v. Chaplin for allowing the choice of the applicable law to be influenced by the particular issue under consideration,[714] and the proper law approach as advocated by Dr. Morris would do likewise.[715] This is also inherent in the rule-selecting approaches which have found support in the United States; and the Restatement Second contemplates the application of its choice of law rules to each issue separately rather than to the case as a whole.[716]

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714 [1971] A.C. 356, 380B per Lord Hodson, 389 ff. and especially 391 ff. per Lord Wilberforce.

715 See Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 892-893; and The Conflict of Laws (3rd ed., 1984), pp. 304-305, 528-529.

716 See, for example, s.145(1), and comment d thereon.

6.76 If dépeçage is to be permitted, however, there must be some way in which our choice of law rule could not only take into account the locus delicti, the occurrence and the parties, but also distinguish between particular issues. While the locus delicti, and also the occurrence and the parties and the place with which they are most closely connected, lend themselves to objective ascertainment (although there may, perhaps, be some room for differences of opinion as to what the "occurrence" was), we find it hard to see how an issue can be connected with a particular place or system of law except by reference to the purpose or policy behind the rule of law in question. This is indeed the main argument in favour of permitting dépeçage;[717] by splitting the case up into issues it may be possible to give effect to the policies or purposes of a number of different rules of law, derived from different systems of law and relating to different issues.

6.77 However, we have observed above[718] that it may be difficult or impossible to ascertain the purpose or policy of a rule of law, and we do not believe it would be justifiable to speculate about such purposes or policies in the absence of evidence, even if the speculation were plausible. Further, it is conceded that in certain circumstances it would be unjustifiable to split rules of law which properly belong together,[719] and if it is difficult to determine the policy or purpose of an individual rule, it

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717 See Boys v. Chaplin [1971] A.C. 356, 392, per Lord Wilberforce; Wilde, "Dépeçage in the choice of tort law", (1968) 41 S. Calif. L.R. 329; Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 137-140; Reese, "Dépeçage: a common phenomenon in choice of law", (1973) 73 Col. L.R. 58. Reese argues that dépeçage may also further other choice of law values.

718 Paras. 4.41 - 4.43.

719 Morris, The Conflict of Laws (3rd ed., 1984), pp. 528-529; Wilde, (1968) 41 S. Calif. L.R. 329; Cavers, [1970] III Hague Rec. 75, 137-140; Reese, (1973) 73 Col. L.R. 58, 66 ff., (whose view (expressed at p. 73) is, however, that "... dépeçage should not always be avoided simply because its use would distort or threaten to distort the purpose of one of the rules applied.")

may be even more difficult to decide whether two rules are related in purpose. We have identified above two types of rule which may be related,[720] but it would be impossible to produce a catalogue of related rules. In the absence of such a catalogue, however, we also believe that it would be difficult to define, for the purposes of any implementing legislation, the degree of relation which should be required of two rules to justify their being kept together.

6.78 In any event, we do not consider that the interests of justice (whether in the individual case or at the choice of law level) necessarily require of the choice of law process that it should result in advancing the policy or purpose of the maximum possible number of competing rules, and either of our proposed choice of law rules would in our view select an appropriate law without the use of dépeçage. It is true that the use of dépeçage would permit some issues in tort or delict to be dealt with by (for example) the lex loci delicti, and others by (for example) the law of the place with which, owing to their individual circumstances, the parties as opposed to the occurrence had the closest and most real connection.[721] It is also true that both of our proposed choice of law rules would in practice start with a consideration of the occurrence, and hence with the lex loci delicti. However, both of our proposed choice of law rules would, without dépeçage, also permit the parties to be taken into account in selecting the applicable law; and where the importance to be attached to the characteristics of the parties or of their relationship outweighs that to be attached to the occurrence, there are in our view strong arguments for deciding all of the substantive issues, and not just some of them, by reference to the law thus indicated. This would accord more closely with the expectations of the parties; and, if the parties were indeed so closely connected with a particular country, it would seem appropriate to expect

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720 The standard of liability and a ceiling on the recovery of damages: para. 6.20.

721 This is the sort of distinction which has been used to illustrate the desirability of dépeçage; see, e.g., Restatement Second, s.145(1), comment d; Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 137-140.

them to accept all the consequences of that fact. It should also be remembered that where the lex loci delicti is departed from in respect of the substantive issues, there will nevertheless be some matters which it continues to regulate, namely foreign rules of conduct, which a court here will take into account whatever the applicable law.[722]

6.79 For these reasons we believe that the introduction of dépeçage into our choice of law rule would be impracticable, unnecessary and over-complicated. It would also give rise to other practical difficulties, since the isolation of different issues in a single case requires that those issues be defined. While (as we have remarked) the locus delicti, the parties and the occurrence lend themselves to objective identification, the same is less true of the issues, which may be capable of several different formulations.

6.80 It is true that the E.E.C. Convention on the Law Applicable to Contractual Obligations (1980) contemplates dépeçage in the sense that different parts of a contract may be governed by different laws by the choice of the parties,[723] and the same is true of a severable part of the contract in the absence of such choice.[724] However, the position in contract is not, in this respect, analogous to that in tort or delict. An agreement between the parties may be best reflected by applying different systems of law to different issues; and even where there is no express agreement to this effect, the agreement as a whole may as a matter of construction or implied intention contain provisions capable of severance. In tort or delict there is no such agreement, but only a dispute, and the same considerations do not apply. It is relevant that even in the case of the contract convention no delegation on the working group which drew up the draft wished to encourage the idea of dépeçage, at least in

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722 For example, an action in England in respect of a motor accident in France would use as data a relevant French speed limit and the French rule requiring vehicles to drive on the right, even if English law was selected as the applicable law by our choice of law rule. See Dicey and Morris, p. 950.

723 Article 3(1).

724 Article 4(1).

the absence of express choice.[725] Further, none of the Continental systems of law which we have considered for the purposes of this paper provides for dépeçage in tort or delict cases.[726]

6.81 Our provisional conclusion, therefore, is that our reformed choice of law rule should not provide for the choice of law to be made separately for different substantive issues in tort or delict: in other words, our choice of law rule should not provide for dépeçage. Comments are invited on this view.

D. MULTIPLE PARTIES

6.82 Where there are three or more parties to a single action the question arises whether the applicable law should be determined separately for each pair of opponents or whether all parties should be taken into account in choosing a single applicable law.

6.83 Although the fact that many people were involved in a incident might be relevant to a description of the "occurrence" for the purposes of either of our proposed choice of law rules, and to this extent may influence the determination of the applicable law, the particular combination of parties in any one action will be determined by entirely unrelated factors and may merely be an accident of procedure. Although it might be convenient to have a single applicable law in a multi-party case, it would in fact be possible for each claimant to bring a separate action against each wrongdoer, and it would not in our view be acceptable that a claimant or a wrongdoer should be able to manipulate the determination of the applicable law by procuring a particular combination of parties.

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725 Report on the Convention by Professor M. Giuliano and Professor P. Lagarde, O.J. 1980 C.282: para. 2 of comment 8 on article 4 (O.J. 1980 C. 282 at p.23), and see also comment 4 on article 3 (ibid. at p. 17).

726 It may, nothwithstanding the absence of express provision, be permitted under the draft Benelux Uniform Law and under Austrian law (see below, Appendix): see Morse, "Choice of Law in Tort: a Comparative Survey", (1984) 32 Am. J. Comp. L. 51, 63, 69.

6.84 Our provisional conclusion is, therefore, that (except in cases of vicarious liability[727]) the determination of the applicable law should be made separately for each pair of opponents.[728] This conclusion is not inconsistent with the present law, although the question does not appear to have arisen in practice. Comments are invited.

6.85 The cases in which such a rule may at first sight appear startling are (a) where many claimants suffer what is in effect the same injury from the same incident (for example, an aircraft crash); and (b) where several wrongdoers act in concert (for example, a conspiracy). Nevertheless, we believe that our proposal is the correct one in these cases also. The first case is startling only because of the numbers involved. The idea that the same wrongdoer may be liable to more than one person each according to a different law is not, we believe, one that in principle causes any difficulty, and it could perfectly well arise elsewhere - for example in contract, where each claimant had a contract with the wrongdoer and each contract was governed by a different proper law. In any event, we believe that such a case would be unlikely to arise in practice. In the second case also we believe it to be unlikely in practice that the conspirators would be liable according to different laws, but we see no reason of principle why they should not be. For example, where a person in England conspires with a person in France to do acts respectively in England and France which injure an English claimant's interests in those respective places, and the acts would be lawful in France but not in England, it seems appropriate that the liability of the conspirator in England should be decided according to English law, but it does not seem self-evident that the liability of the conspirator in France should also be so decided.

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727 See para. 6.10 above.

728 This is the rule provided for in respect of multiple wrongdoers by article 136 of the Swiss proposals: see Appendix. The accompanying commentary says that it is self evident that the same rule would apply to multiple claimants: para. 284.4.

E. COMPENSATION SCHEMES

6.86 Under our revised choice of law rule in tort and delict, it is possible that the applicable law may turn out to be that of a country where the arrangements for compensating victims rely not upon establishing the civil liability of the wrongdoer in tort or delict, but rather upon a claim by the victim against an insurance company (his own or the wrongdoer's) or a compensation fund. This question could, indeed, arise under our present law, since both the rule in Phillips v. Eyre and that in McElroy v. McAllister refer to the lex loci delicti; and it is thought that the right to compensation under a compensation scheme would not necessarily be enough to satisfy the double actionability rule in so far as it requires that liability should exist under the lex loci delicti.[729]

6.87 The schemes concerned could be of several kinds.[730] For example, one type is the administrative compensation scheme run by a central authority. The best known example of such a scheme is perhaps that in force in New Zealand.[731] Another is a system of compulsory insurance, the terms of which are regulated by law.[732] A compensation or insurance scheme may or may not be complemented by the abolition or curtailment of the victim's right to recover damages from the wrongdoer.

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729 See above, paras. 2.17, 2.42.

730 Volume 3 of the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury ((1978) Cmnd. 7054-III) contains descriptions of a number of overseas systems of compensation.

731 Accident Compensation Act 1982 (Act No. 181 of 1982), consolidating earlier enactments. See Webb and Auburn, "New Zealand conflict of laws - a bird's eye view", (1977) 26 I.C.L.Q. 971, 983-991.

732 For example, the "no-fault" schemes in force in some of the United States. The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Vol. 3 ((1978) Cmnd. 7054-III) contains, at paras. 144 ff., an account of such schemes. See also Kozyris, [1972] Duke L.J. 331 and [1973] Duke L.J. 1009.

6.88 There are therefore four possible combinations of circumstances which may arise in an action in this country, and the question is whether our reformed choice of law rule would be capable of dealing satisfactorily with these four cases.

Case 1: Claimant's right of action for damages not curtailed, and he has no rights under compensation scheme

6.89 This case does not, in our view, give rise to any difficulty. It is true that, where the right of action for damages is merely the residual tort or delict law of a country where it is rarely used owing to the existence of a compensation scheme, it may be that the court here would be "... drawing on frozen rules no longer subject to statutory reform and common law development".[733] To the extent that this is unsatisfactory, however, it is no more so than where the action is brought in the courts of the place whose law is being applied; and in our view there is no reason for us to make up the deficiency. No new problem would be created by either of our proposed choice of law rules.

Case 2: Claimant's right of action for damages not curtailed, but he is also able to recover under the compensation scheme

6.90 The further difficulty that arises in this case is whether any provision need be made here to prevent the claimant from recovering twice: by action here, and again under the compensation scheme. In our view no such provision is necessary. Whether or not the claimant is permitted to recover under the compensation scheme and also by action in tort or delict is, in our view, a matter for the applicable law, and not a matter arising from the rules for choosing the applicable law.

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733 Shapira, "New Zealand accident compensation and the foreign plaintiff: some conflict of laws problems", (1980) 12 Ottawa L.R. 413, 423.

Case 3: Claimant's right of action for damages is curtailed or abolished, but he is entitled to recover under the compensation scheme instead

6.91 This is probably the most likely case. It would seem clear that, in general, the courts in this country will be unable to grant the claimant a remedy based on the compensation scheme, except in the unlikely event that the compensation fund or insurance company was before the court, and the scheme permitted the claimant to sue the fund or company directly. In most cases it would therefore follow that the claimant's claim would not succeed here, either for want of a defendant or defender, or (if the claimant sued the wrongdoer instead of the compensation fund or insurance company) because the wrongdoer would under the applicable law benefit from the abolition or curtailment of the right of action in tort or delict. The claimant would therefore have to recover against the fund or insurance company elsewhere - probably in the country of the fund.

6.92 We do not, however, believe this to be in principle an unacceptable result. If a particular country chooses to abolish the civil action and to substitute for it some other way of compensating victims which happens not to be within the power of our courts to operate, we can see no reason why the scheme of the country in question should be circumvented. The alternative would be to allow an action here by the victim against the wrongdoer to proceed and, perhaps, to succeed. However, this would involve injustice to the wrongdoer, since he would be exposed to liability in tort or delict under some law other than that which would otherwise apply, and against which liability he may well have had no practical chance to insure.[734] No converse injustice to the claimant would be brought about by our proposed choice of law rule, since he would always have his claim in the foreign country against the compensation fund.

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734 See Shapira, (1980) 12 Ottawa L.R. 413, 434, citing Cavers, (1971) 9 Duq. L.R. 362, 365.

6.93 Further, to depart from our proposed choice of law rule in this case would involve a logical anomaly, since it would mean that, in order to allow the claimant's action to succeed, the choice of law rule would in this one case have to take into account not only the locus delicti, the occurrence, and the parties, but also the result of any given choice. Although, as we have said,[735] it may be idle to suppose that the court will in fact never be aware of these results, we do not believe it would be right to build such a factor into our choice of law rule in this one case.

6.94 For these reasons we also do not believe it right to make special provision here to cover the case where the compensation to which the claimant would be entitled was, in our eyes, inadequate.[736]

Case 4: Claimant's right of action for damages is curtailed or abolished, and he is not covered by the compensation scheme either

6.95 Although at first sight this may seem the most startling case (and we do not know whether it could in fact ever arise in practice), we believe that the same arguments as in Case 3 apply, and that no modification of our choice of law rule would be required. If, for example, the potential claimant has gone to a country where such a rule prevails, having failed to take out adequate insurance, and the law of that country would be applicable in an action here, there seems no reason why our choice of law rule should be adjusted in his favour where he would be denied recovery in the courts of that country. The only case where our choice of law rule could in theory result in injustice is where the

735 Para. 4.17 above.

736 An example of potentially inadequate cover, coupled with the abolition of common law rights, is that provided under the New Zealand scheme to a visitor to New Zealand who is not a New Zealand earner (i.e. who is employed, or whose income arises, outside New Zealand). Such a person is not entitled to the 80% compensation for loss of earning capacity which is otherwise provided for under the New Zealand scheme: Accident Compensation Act 1982, ss. 52(2)(j), (3)(j); 53(1); 59. See Webb and Auburn, (1977) 26 I.C.L.Q. 971, 985-986; and Shapira, (1980) 12 Ottawa L.R. 413, 417-418.

claimant's rights were restricted by the operation of our choice of law rule, not by the operation of the domestic law selected, but we cannot think of a situation in which this could occur.

6.96 We have, therefore, reached the provisional conclusion that neither of our proposed choice of law rules in tort and delict requires modification in cases where it selects the law of a place where an insurance or compensation scheme is in force. Comments are invited.

PART VII

SUMMARY OF PROVISIONAL CONCLUSIONS AND PROPOSALS

Introduction

7.1 Throughout this consultation paper we have used a number of Latin phrases, including "lex fori" (the law of the forum), "locus delicti" (the country where the tort or delict occurred) and "lex loci delicti" (the law of the country where the tort or delict occurred). We used these phrases for reasons of convenience only, and it would not be appropriate to use them in any implementing legislation. We have therefore not used them in this summary of provisional conclusions and proposals, but have used their English equivalents instead.

The main issue

7.2 The essential proposal in this consultation paper is that our existing choice of law rule in tort and delict be abolished and replaced by one or other of two alternatives. The main questions upon which comment is invited are -

(a) whether either or both of these alternatives is acceptable; and

(b) if both, which is to be preferred; or, if neither, what other rule should be adopted.

The broad outline of the alternative proposals as they would be if all our provisional conclusions were accepted is as follows:

Model 1: The application, subject to an exception, of the law of the country where the tort or delict occurred.

General rule

The applicable law is that of the country where the tort or delict occurred.

Definition, for multi-state cases, of the country where the tort or delict occurred

(i) personal injury and damage to property:
the country where the person was when he was injured or the property was when it was damaged;

(ii) death:
the country where the deceased was when he was fatally injured;

(iii) defamation:
the country of publication;

(iv) other cases:
the country in which the most significant elements in the train of events occurred.

Rule of displacement

The law of the country where the tort or delict occurred may be disapplied, and the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection applied instead, but only if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred and a substantial connection with the other country.

Model 2: The proper law

General rule

The applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Presumptions

In the case of the following types of tort or delict, the country with which the occurrence and the parties had the closest and most real connection is presumed to be, unless the contrary is shown-

(i) personal injury and damage to property:
the country where the person was when he was injured or the property was when it was damaged;

(ii) death:
the country where the deceased was when he was fatally injured;

(iii) defamation:
the country of publication.

A presumption may be departed from only if the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.

Our provisional conclusions and proposals in detail

7.3 The two models outlined above have been built up from a large number of individual conclusions, and we have also made provisional proposals on many matters of detail which do not appear in the above outline of our two alternative models. Accordingly we set out here a summary of the provisional conclusions reached and proposals made in Parts IV to VI of this consultation paper. We invite comment on all of them.

PART IV: THE OPTIONS FOR REFORM

Agreement as to the applicable law

1. (a) It should be possible (before or after a tort or delict has occurred) to agree by means of contract what law should govern the parties' mutual liability in tort or delict. Such agreement should be effective whether or not it results in the application of the law of the forum.

(b) We invite comment on our provisional view that any implementing legislation should expressly provide for this proposal.

[paragraph 4.21]

Options for reform which we have provisionally rejected

2. We have provisionally concluded that the following are not acceptable options for reform:

(i) application of the law of the forum alone;

[paragraphs 4.24 - 4.29]

(ii) application of the law of the forum with exceptions;

[paragraphs 4.32 - 4.34]

(iii) the governmental interest analysis or comparative impairment approach;

[paragraphs 4.36 - 4.45]

(iv) the application of principles of preference;

[paragraphs 4.46 - 4.50]

(v) the application of choice-influencing considerations.

[paragraphs 4.51 - 4.54]

The alternative options for reform which we provisionally propose

Model 1: the application, subject to an exception, of the law of the country where the tort or delict occurred

3. The law of the country where the tort or delict occurred is in many cases the most appropriate law to apply. As the prima facie applicable law, it provides a suitable starting point for a choice of law rule in tort and delict, whether or not the train of events was confined to a single country.

[paragraphs 4.55 - 4.60]

4. In a multi-state case, the country where the tort or delict occurred should be defined as follows-

(i) for cases of personal injury or damage to property, as the country where the person was when he was injured or the property was when it was damaged;

[paragraphs 4.78 - 4.82]

(ii) for cases of death, as the country where the deceased was when he was fatally injured;

[paragraphs 4.78 - 4.82]

(iii) for cases of defamation, as the country of publication.

[paragraphs 5.30 - 5.46]

No other type of tort or delict in our view requires an individual definition of the country where the tort or delict occurred.

5. In all multi-state cases other than those expressly provided for, the country where the tort or delict occurred should be defined in terms of the country where the most significant elements in the train of events occurred.

[paragraphs 4.83 - 4.89]

6. The application in all cases, without exception, of the law of the country where the tort or delict occurred would not be acceptable. Exceptions to the basic lex loci delicti rule could be specific or general. We discuss three possible specific exceptions. We provisionally conclude that none of them would be satisfactory by itself, and that it would be impracticable to adopt more than one.

[paragraphs 4.92 - 4.117]

7. We conclude that instead of specific exceptions there should be a single general exception. The general exception would permit the disapplication of the law of the country where the tort or delict occurred; instead, the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection would apply. It would in our view be impracticable to define the concept of "closest and most real connection".

[paragraphs 4.118 - 4.121]

8. A threshold or trigger requirement should be built in to the general exception which would serve to prevent departure from the application of the law of the country where the tort or delict occurred in the absence of strong grounds for doing so. Our tentative view as to the terms of the threshold requirement is that the law of the country where the tort or delict occurred should be displaced in favour of the law of the country with which the occurrence and the parties had the closest and most real connection only if their connection with the country where the tort or delict occurred was insignificant and their connection with the other country substantial.

[paragraphs 4.122 - 4.123]

9. We do not believe that a scheme incorporating both specific exceptions and a general exception would be practicable.

[paragraph 4.124]

Model 2: the proper law model

10. A proper law approach, combined with rebuttable presumptions as to the proper law for particular types of tort and delict, is the second of the two alternative options which we provisionally propose for reform of our choice of law rule. We reject a pure proper law rule, without more, as unacceptably uncertain, and we conclude also that the addition to a basic proper law rule of a list of factors or guidelines stated in general terms would not be sufficient to introduce into the basic rule an acceptable degree of certainty, and would also be unsatisfactory for other reasons.

[paragraphs 4.126 - 4.142]

11. The basic proper law rule should be that the applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

[paragraph 4.140]

12. The rebuttable presumptions to be added to the basic proper law rule should be as follows: the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary was shown, be presumed to be -

(i) in a case of personal injury or damage to property, the country where the person was when he was injured or the property was when it was damaged;

[paragraph 4.140]

(ii) in a case of death, the country where the deceased was when he was fatally injured;

[paragraph 4.140]

(iii) in a case of defamation, the country of publication.

[paragraphs 5.30 - 5.46]

We also conclude that no further presumptions need be added to this list.

13. A threshold requirement should be introduced which would prevent the presumptions from being rebutted except where there were strong grounds for doing so: our tentative view is that the presumptions should not be departed from unless the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.

[paragraph 4.141]

PART V: OUR PREFERRED OPTIONS AS APPLIED TO PARTICULAR TYPES OF TORT AND DELICT

Traffic Accidents

14. No special addition to either of our proposed models would be required to deal with traffic accidents.

[paragraphs 5.4 - 5.5]

Products liability

15. No special addition to either of our proposed models would be required to deal with products liability cases whether or not the train of events was confined to a single country.

[paragraphs 5.6 - 5.25]

Liability resulting from the making of statements

16. Apart from defamation, no special addition to either of our proposed models is required to deal with torts and delicts which relate to the making of statements.

[paragraphs 5.26 - 5.29]

17. In a defamation action, whether based upon a single statement or upon a multiple statement,

(i) where the statement originated in one country and was published in another, the country where the statement was published should be considered as the country where the tort or delict occurred for the purposes of our first alternative model for reform (which would apply, subject to an exception, the law of that country);

(ii) for the purposes of our proper law model, the country where the statement was published should be presumed to be that with which the occurrence and the parties had the closest and most real connection.

[paragraphs 5.30 - 5.46]

18. No express provision should be made to deal with any defamation case where a statement would give rise to no liability under the law of the country of origin, but would give rise to liability under the law selected by our choice of law rule.

[paragraphs 5.47 - 5.50]

19. (a) Any statement which would attract absolute privilege under our own internal law should benefit from this protection even if our choice of law rule were to select a foreign law to govern the question of defamation; we invite comment on whether express provision would be necessary or desirable to achieve this result in any implementing legislation, or whether it would be satisfactory to leave this matter to the application of principles of public policy.

[paragraphs 5.52, 5.56]

(b) Although there are some cases in which our own internal defence of qualified privilege should also be available in an action in the United Kingdom, whatever the applicable law, there are others in which it should not; and it would be unnecessarily complicated to provide for such a defence in implementing legislation. It will be satisfactory to leave this matter to the application of principles of public policy.

[paragraphs 5.53 - 5.56]

Economic torts and delicts

20. No special definition of the country where the tort or delict occurred should be formulated in this area for the purpose of our first alternative model for reform; and no presumption should be provided for our proper law model.

[paragraphs 5.57 - 5.60]

21. We invite comment on whether actions based on economic torts or delicts should be wholly or partly excluded from our proposed new choice of law rule, and on whether the damages obtainable should be restricted.

[paragraphs 5.61 - 5.66]

22. If special provision is to be made for economic torts and delicts, we invite comment on the types of economic tort and delict to which such provision should apply, and on how these torts and delicts are to be defined for statutory purposes.

[paragraph 5.66]

Interference with goods

23. No special addition to either of our proposed models would be required to deal with cases of interference with goods.

[paragraphs 5.67 - 5.68]

Nuisance

24. No special addition to either of our proposed models would be required to deal with cases of nuisance.

[paragraphs 5.69 - 5.70]

Torts or delicts involving ships or aircraft

25. Our reformed choice of law rule in tort and delict should not apply to cases concerning collisions on the high seas, or to any other case to which the general principles of maritime law extend or to which our existing choice of law rules in tort and delict do not apply. We invite comment on whether it would be desirable expressly to exclude such cases in any implementing legislation, and if so upon how the area in question should be defined for statutory purposes.

[paragraphs 5.71 - 5.73]

26. Our reformed choice of law rule should not extend to those cases involving aircraft to which our present choice of law rule does not apply.

[paragraph 5.74]

27. (a) Where a train of events is confined to a single ship or aircraft, it should be considered for choice of law purposes as having taken place in the state to which the ship or aircraft belongs.

(b) No provision should be made for a train of events not confined to a single ship or aircraft.

[paragraphs 5.76 - 5.83]

28. The state to which a ship or aircraft belongs should be the state where it is registered.

[paragraph 5.84]

29. (a) If the state where a ship is registered contains more than one country, the state to which the ship belongs should be identified by its port of registry.

(b) We invite comment on whether there is a satisfactory way of connecting an aircraft with a single country within a state which contains more than one country.

[paragraphs 5.84 - 5.86]

30. For the purposes of our choice of law rule as it applies to aircraft, an event should be taken to have occurred aboard an aircraft only if the aircraft was in flight. "In flight" should be defined in terms similar to those used in section 38(3)(a) of the Aviation Security Act 1982.

[paragraphs 5.87 - 5.88]

Torts or delicts occurring in a single jurisdiction within the United Kingdom

31. Our reformed choice of law rule should apply, in an action in England and Wales, or in Scotland, or in Northern Ireland, to torts or delicts which occurred in those respective places.

[paragraphs 5.89 - 5.92]

PART VI : PARTICULAR ISSUES

Capacity

32. The delictual capacity of an individual and of a corporation should be governed by the applicable law in tort or delict.

[paragraph 6.4]

Vicarious liability

33. Whether or not it is possible to impose vicarious liability should continue to be governed by the applicable law in tort or delict.

[paragraphs 6.6 - 6.9]

34. The law applicable in an action by a claimant against a vicariously liable defendant or defender should be the same as that which would have applied in an action by the claimant against the actual wrongdoer. We invite comment on whether this point needs to be expressly provided for in implementing legislation.

[paragraph 6.10]

35. It would not in our view be practicable to formulate a special provision (apart from the rules of public policy generally applicable) whereby the imposition of vicarious liability could be avoided in cases where we should find it so inconsistent with our own notions of justice that for reasons of public policy the defendant or defender should not be held vicariously liable. However, if such a provision were felt to be desirable, we invite comment on what provision should be made, and the circumstances in which it should operate.

[paragraphs 6.11 - 6.14]

Defences and immunities

36. Substantive defences should continue to be governed by the applicable law in tort and delict.

[paragraph 6.15]

Damages

37. The applicable law in tort or delict should continue to determine what heads of damage are available; and the measure or quantification of damages should continue to be governed by the law of the forum. No express guidance need be given in implementing legislation on the question of assessing the quantum of damages under a head of damage unknown to the law of the forum.

[paragraphs 6.16 - 6.17]

Limitations on recovery

38. A ceiling on the amount of damages recoverable should be governed by the applicable law in tort or delict.

[paragraphs 6.18 - 6.20]

Prescription and limitation of actions

39. We make no proposal in this area.

[paragraph 6.21]

Transmission of claims on death: the survival of actions

40. Whether or not an action in tort or delict survives the death of the potential claimant should be governed by the applicable law in tort or delict.

[paragraphs 6.24 - 6.30]

41. Whether or not a claimant may pursue an action in tort or delict against the estate of the wrongdoer after the wrongdoer has died should also be governed by the applicable law in tort or delict.

[paragraphs 6.31 - 6.32]

42. Whether or not a claim in tort or delict subsists after the death of either party after the action has begun should be treated in the same way as transmission of a claim before proceedings are commenced.

[paragraph 6.33]

43. A person suing in the United Kingdom on behalf of the estate of a deceased person should be required to take out a grant of representation at the forum. This expression means, in England and Wales and in Northern Ireland, a grant of probate or letters of administration; in Scotland, the issue of confirmation. It is irrelevant whether or not such a person has complied or is required to comply with a corresponding requirement under any foreign law.

[paragraph 6.34]

Wrongful death

44. The existence of an action for wrongful death, and the description of those for whose benefit it exists, are matters which should continue to be governed by the applicable law in tort and delict.

[paragraph 6.35]

45. The applicable law in a wrongful death action should be that which would have been applied in an action by the deceased or his estate against the wrongdoer.

[paragraphs 6.36 - 6.37]

46. The claimant should be required to take out a grant of representation at the forum (see no. 43 above) if he is suing on behalf of the estate of the deceased, but not otherwise; it is irrelevant whether or not the claimant has taken out or is required to take out a grant of representation under any foreign law.

[paragraphs 6.38 - 6.39]

Intra-family immunities

47. Whether or not there is interspousal immunity, or immunity between parent and child, should be governed by the applicable law in tort or delict.

[paragraphs 6.40 - 6.45]

Contribution

48. Rights of contribution should not be governed by our choice of law rule in tort and delict. Views are invited on whether any implementing legislation should expressly exclude the question of contribution.

[paragraphs 6.46 - 6.49]

Indemnity

49. Rights of indemnity should not be governed by our choice of law rule in tort and delict. Views are invited on whether any implementing legislation should expressly exclude the question of indemnity.

[paragraph 6.50]

Tort and contract

50. The interpretation and validity of a term in a contract which purports to provide a defence to a claim in tort or delict should be decided by the proper law of the contract (as determined by the forum's rules of private international law); the effect of the term (if valid), as so interpreted, as a defence to the claim in tort and delict should be decided by the applicable law in tort and delict.

[paragraphs 6.51 - 6.53]

51. For reasons of convenience, agreements (including assignments or assignations) transacted after the tort or delict has occurred should be treated in the same way as antecedent contracts (see no. 50 above). However, if post-

event transactions were to be treated differently from antecedent contracts our proposal would be that all such post-event transactions should be treated in the same way, regardless of the nature of the transaction.

[paragraphs 6.54 - 6.57]

52. The rule which forms part of some systems of law that a claim cannot be brought in tort or delict if the claimant could bring a claim in contract will (with one possible exception) not give rise to problems in actions in this country. The possible exception is that if a claimant were forced to sue in contract instead of in tort or delict, he might then find that, by the proper law of the contract, contractual claims were excluded if there was a delictual claim. We invite comment on whether this could ever occur and, if so, whether any provision to cater for the phenomenon should be included in our choice of law scheme.

[paragraphs 6.58 - 6.60]

Direct action by third party against insurer

53. We invite comment on whether it is in practice more likely that a direct action provided for under the proper law of an insurance contract will extend to foreign accidents, or that a direct action provided for under the applicable law in tort and delict will extend to foreign insurance contracts (and perhaps also foreign accidents). Our tentative conclusion is that the former is more likely.

[paragraph 6.66]

54. On balance we have reached the view that if the issue of direct liability is to be governed by one system of law only, that system should be the proper law of the insurance contract; but we invite comment on whether it would, as an alternative, be desirable to provide that an action may be

brought directly against the insurer if this is permitted either by the proper law of the insurance contract or, failing that, by the applicable law in tort or delict.

[paragraphs 6.61 - 6.68]

55. Where the direct action legislation in question itself requires the use of a choice of law rule in tort or delict (for example, where it is necessary to determine whether the wrongdoer would have been liable if he had been sued in an action at the forum), the choice of law rule to be used in a direct action in the United Kingdom should be that of the country whose direct action legislation is being applied in the United Kingdom.

[paragraphs 6.69 - 6.72]

Dépeçage and the importance of the issue in the case

56. Our reformed choice of law rule should not provide for the choice of the applicable law to be made separately for different substantive issues in tort or delict: in other words, our choice of law rule should not provide for dépeçage.

[paragraphs 6.73 - 6.81]

Multiple parties

57. Where there are three or more parties to a single action, the choice of the applicable law should be made separately for each pair of opponents.

[paragraphs 6.82 - 6.85]

Compensation schemes

58. No amendment of either of our proposed models for reform is necessary to cater for an applicable law under which the arrangements for compensating victims rely upon a compensation scheme rather than upon establishing the civil liability of the wrongdoer.

[paragraphs 6.86 - 6.96]

APPENDIX[737]

Provisions on the choice of law in tort and delict cases from selected foreign countries and from the E.E.C. Draft Convention

Austria

Statute on Private International Law[738]
Enacted 15 June 1978; in force 1 January 1979.

Article 1

(1) Factual situations with foreign contacts shall be judged, in regard to private law, according to the legal order to which the strongest connection exists.

(2) The special rules on the applicable legal order which are contained in this Federal Statute (conflicts rules) shall be considered as expressions of this principle.

Article 48

(1) Noncontractual damage claims shall be judged according to the law of the state in which the damage-causing conduct occurred. However, if the persons involved have a stronger connection to the law of one and the same other state, that law shall be determinative.

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737 The material in this Appendix is largely taken from a paper prepared for the Joint Working Party by Mr. C.G.J. Morse of King's College London. An article based on that paper, "Choice Of Law In Tort: A Comparative Survey", has appeared at (1984) 32 Am. J. Comp. L. 51.

738 Translation by Palmer, "The Austrian Codification of Conflicts Law", (1980) 28 Am. J. Comp. L. 197, 222, 234.

(2) Damages and other claims arising from unfair competition shall be judged according to the law of the state where the market affected by the competition is located.[739]

Austria has ratified the Hague Traffic Accidents Convention.

France

There is no provision of French law expressly directed to the choice of law in delict cases, but the courts have deduced from article 3(1) of the Civil Code[740] that the lex loci delicti applies.[741]

France has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Germany (Democratic Republic)

Act Concerning the Law Applicable to International Private, Family and Labour Law Relationships as well as to International Commercial Contracts[742]

In force 1 January 1976.

Article 17 (Law Applicable to Non-Contractual Liability)

(1) The liability for injuries inflicted outside of contractual relationships, including competency and other personal prerequisites

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739 It should be noted that the Austrian rules provide for renvoi (article 5), which is not excluded in tort and delict cases.

740 "Les lois de police et de sûreté obligent tous ceux qui habitent le territoire."

741 Lautour c. Guiraud Cass. civ. 25.5.1948, D.1948.357, S.1949.1.21, (1949) 38 Rev. crit. d.i.p. 89; Kieger c. Amigues Cass. civ. 30.5.1967, (1967) Rev. crit. d.i.p. 728.

742 Translation by Juenger, "The conflicts statute of the German Democratic Republic: an introduction and translation", (1977) 25 Am. J. Comp. L. 332, 359.

as well as the measure of damages, is governed by the law of the state in which the injury was caused.

(2) Injuries inflicted in connection with the operation of a vessel on or aircraft over the high seas are governed by the law of the state whose flag or national insignia the vessel or aircraft displays.

(3) If the person who inflicted the injury and the injured party are nationals or residents of the same state, the law of that state shall apply. This rule also applies to enterprises whose legal status is controlled by or which have their principal place of business in the same state.

Germany (Federal Republic)[743]

In principle the lex loci delicti applies, but is subject to the following restrictions.

EGBGB (Introductory Law to the Civil Code) (1896)[744]

Article 12

By reason of an unlawful act committed in a foreign country, no greater claims can be enforced against a German than those created by German law.

Regulation of 7 December 1942[745]

Claims for extracontractual damages based on an act or omission of a German national committed abroad are governed by German law, insofar as a German national has been damaged.

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743 The law of the Federal Republic of Germany is currently undergoing revision.

744 Translation by Drobnig, American-German Private International Law (2nd ed., 1972), p. 401.

745 Ibid., p. 215, n. 16.

Hungary

Decree on Private International Law[746]

In force 1 July 1979.

Article 32

(1) Unless this Decree orders otherwise, the liability for damages inflicted outside of a contractual relationship shall be determined by the law controlling at the time and place of the tortious act or omission.

(2) If it is preferable to the injured party, the law of the State in which the damage occurred shall control.

(3) If the domicile of the tortfeasor and the injured party is in the same State, the law of that State shall be applied.

(4) If, according to the law governing the tortious act or omission, liability is conditioned on a finding of culpability, the existence of culpability can be determined by either the personal law of the tortfeasor or the law of the place of injury.

Article 33

(1) The law of the place of the tortious conduct shall determine whether the tortious conduct was realized by the violation of traffic or other security regulations.

(2) If the tortious act or omission occurs on a registered water vehicle or aircraft, the infliction of tortious damages and its consequences shall be determined by the law of the State under whose flag or markings the vehicle was operated at the time of the legal injury - which occurs outside of the national jurisdiction of that State.

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746 Translation by Gabor, "A socialist approach to codification of private international law in Hungary: comments and translation", (1980) 55 Tulane L. R. 63, 98.

Article 34

(1) The Hungarian Court shall not determine liability for such conduct which is not unlawful under Hungarian law.

(2) The Hungarian Court shall not determine the legal consequences for infliction of tortious damages, which are not known under Hungarian law.

Italy

Civil Code (1942)[747]

Provisions on the law in general, Article 25

Non-contractual obligations are governed by the law of the place where the facts from which they arise took place.

Italy has signed, but not ratified, the Hague Products Liability Convention.

The Netherlands

The Dutch choice of law rules in tort and delict are judge-made but are based on the proposal for a Benelux Uniform Law on Private International Law,[748] which provides in relevant part as follows.

Article 14

(1) The law of the country where an act takes place shall determine whether this act constitutes a wrongful act, as well as the obligations which result therefrom.

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747 Translation from Beltramo, Longo and Merryman, The Italian Civil Code (1969).

748 Originally promulgated in 1951; revised (without change in the tort and delict provisions) in 1969; never formally entered into force. See Nadelmann, "The Benelux Uniform Law on Private International Law", (1970) 18 Am. J. Comp. L. 406. Courts in Luxembourg have adopted these rules, but the Belgian courts have not: the lex loci delicti rule largely prevails there.

(2) However, if the consequences of a wrongful act belong to the legal sphere of a country other than the one where the act took place, the obligations which result therefrom shall be determined by the law of that other country.[749]

The Netherlands has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Poland

Code on Private International Law (Law of 12 November 1965)[750]

In force 1 July 1966.

Article 31

(1) Obligations, which do not arise from legal transactions, are subject to the law of the state in which the event giving rise to such obligations occurred.

(2) However, the national law applies where the parties are citizens of the same state and have their domicile in that state.

(3) The proper law defined in the preceding paragraphs shall determine whether a person having a limited capacity to enter into legal transactions shall be liable for the damage caused through an illicit act.

Portugal

Civil Code (25 November 1966)[751]

In force 1 June 1967.

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749 Translation by Nadelmann, (1970) 18 Am. J. Comp. L. 406, 424.

750 Translation by Lasok, Polish Family Law (1968), p. 294.

751 French text at (1968) 57 Rev. crit. d.i.p. 369. This translation is partly by Morse and partly from Cavers, "Legislative choice of law: some European examples", (1971) 44 So. Calif. L.R. 340, 353-354.

Article 45

(1) Non-contractual liability, whether based on an unlawful act, on the creation of a risk or any other conduct, shall be governed by the law of the state where the principal activity causing the damage took place; in the case of liability for omissions, the applicable law shall be the law of the place where the party responsible should have acted.

(2) If the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former place shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission.

(3) If, however, the actor and the victim have the same nationality or, failing that, have the same habitual residence, and they happen to be ["se encontrarem ocasionalmente"] in a foreign country, the applicable law shall be that of the common nationality or habitual residence, without prejudice to provisions of local state laws which must be applied to all persons without differentiation.

Portugal has signed, but not ratified, the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Spain

Civil Code

Preliminary Title, Article 10(9) (as revised 1974)

Non-contractual obligations shall be governed by the law of the place where the event from which they derive has occurred.[752]

752 Unofficial translation from (1974) 21 Ned. Tijd. v. I.R. 367, 372.

Switzerland

The private international law of Switzerland is at present undergoing revision, and the following are the proposals relating to tort and delict cases.[753]

Article 14 ("Clause d'exception")

(1) The law selected according to this enactment is exceptionally not applicable if, in the light of all the circumstances, it is clear that the action has but a very loose connection with that law and has a much closer connection with another law.

(2) This provision does not apply if the parties have agreed the applicable law.

Article 129 (Applicable law: in general)

(1) Where the wrongdoer and the victim have their habitual residence in the same country, a claim based upon a wrongful act is governed by the law of that country.

(2) Where the wrongdoer and the victim do not have a common habitual residence, such a claim is governed by the law of the country where the wrongful act was done. However, where the result occurred in a different country, the law of the latter is applicable if the wrongdoer could have foreseen that the result would occur in that country.

(3) Notwithstanding the preceding clauses, where a wrongful act constitutes an infringement of a pre-existing legal relationship between wrongdoer and victim, a claim based upon that act is governed by the law applicable to that legal relationship.

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753 The French text of these proposals, together with an explanatory commentary, is to be found in a document (ref. no. 82.072) entitled "Message concernant une loi fédérale sur le droit international privé", dated 10 November 1982. The translation which appears here is our own.

(4) The wrongdoer and the victim may agree at any time after the harmful event that the lex fori shall apply.

Article 130 (Applicable law: in particular - traffic accidents)

Claims arising out of traffic accidents are governed by the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.[754]

Article 131 (Applicable law: in particular - products liability)

(1) A claim based upon a defect in, or a defective description of, a product is governed, at the victim's choice:

(a) By the law of the country in which the wrongdoer has his place of business ["établissement"] or, if he has no place of business, his habitual residence; or

(b) By the law of the country where the product was acquired, unless the wrongdoer proves that the product was put on the market in that country without his consent.

(2) Where a claim based upon a defect in, or a defective description of, a product is governed by a foreign law, no damages may be awarded in Switzerland other than those which would be awarded for a similar injury under Swiss law.

(3) Article 129(3) of this enactment applies.

Article 132 (Applicable law: in particular - unfair competition)

(1) A claim based upon an act of unfair competition is governed by the law of the country upon whose market the result occurred.

(2) If the act affected the interests of a particular competitor only, the applicable law is that of the seat ["siège"] of the affected concern.

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754 Switzerland has signed but not yet ratified this Convention.

(3) Article 129(3) of this enactment applies.

Article 133 (Applicable law: in particular - restrictive practices)

(1) A claim based upon a restrictive practice is governed by the law of the country upon whose market the restrictive practice directly affects the victim.

(2) Where a claim based upon a restrictive practice is governed by a foreign law, no damages may be awarded in Switzerland other than those which would be awarded under Swiss law in respect of a restrictive practice.

Article 134 (Applicable law: in particular - nuisance)

A claim based upon a harmful nuisance coming from a building ["immeuble"] is governed, at the victim's choice, by the law of the country in which the building is situated or by the law of the country in which the result occurred.

Article 135 (Applicable law: in particular - defamation)

A claim based upon a public defamation by means of the press, radio, television or any other public mass medium is governed, at the choice of the victim:

(a) By the law of the victim's habitual residence;

(b) By the law of the country where the author has his place of business or habitual residence; or

(c) By the law of the country where the defamation had its effect.

Article 136 (Applicable law: special rules - multiple actors)

Where more than one person participated in a wrongful act, the applicable law shall be determined separately for each of them, whatever their role.

Article 137 (Applicable law: special rules - direct action against insurer)

The victim may bring his action directly against the wrongdoer's insurer if this is permitted by the law governing the wrongful act or by the law governing the contract of insurance.

Article 138 (Applicable law: scope)

(1) The law governing the wrongful act determines, in particular, delictual capacity, the conditions and extent of liability, and also the party liable.

(2) The rules relating to conduct and safety ["règles de sécurité et de comportement"] of the place of the act shall be taken into account.

Turkey

Statute on Private International Law and International Procedure[755]

Enacted 20 May 1982.

Article 25

(1) Non-contractual obligations arising out of wrongful acts are governed by the law of the country where the act was done.

(2) Where the act giving rise to liability occurs in a different country from the damage, the applicable law is that of the country where the damage occurs.

(3) Where the wrongful act gives rise to a stronger legal connection with another country, the law of that other country may be applied.

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755 Our own translation from French text in (1983) 72 Rev. crit. d.i.p. 141.

Yugoslavia

Statute on the resolution of conflicts of law[756]

Enacted 15 July 1982.

Article 28

(1) Subject to contrary provision in particular cases, non-contractual liability is governed either by the law of the country where the wrongful act was done or the law of the country where its results occurred, whichever is more favourable to the victim.[757]

(2) ...

(3) Whether or not an act is wrongful is determined according to the law of the country where the act was done or of the country where its results occurred; if the act was done or the results occurred in a number of places, it is enough that the act should be wrongful according to the law of one of those places.

Article 29

If the event which gives rise to liability occurred on board a ship, on the high seas, or on board an aircraft, the law of the country in which the ship or aircraft is registered shall be taken as the law of the country in which the event occurred.

Yugoslavia has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

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756 Our own translation from French text in (1983) 72 Rev. crit. d.i.p. 353.

757 It should be noted that the Yugoslav rules provide for renvoi (article 6).

Extracts from the E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1972)[758]

Article 10

(1) Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred.

(2) However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connexion with another country, then the law of that other country shall apply.

(3) Such a connexion must normally be based on a connecting factor common to the victim and the author of the damage or injury or, if the liability of a third party for the acts of the author is at issue, it must normally be based on one which is common to the victim and the third party.

(4) Where there are two or more victims, the applicable law shall be determined separately for each of them.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular:

1 the basis and extent of liability;

2 the grounds for exemption from liability, any limitation of liability, and any apportionment of liability;

3 the existence and kinds of damage or injury for which compensation may be due;

4 the form of compensation and its extent;

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758 These extracts are taken from a consultative document on the E.E.C. Draft Convention produced in August 1974 by the Law Commission and the Scottish Law Commission.

5 the extent to which the victim's heirs may exercise his right to compensation;

6 the persons who have a right to compensation for damage or injury which they personally have suffered;

7 liability for the acts of others;

8 rules of prescription or limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of this period.

Article 12

Irrespective of which law is applicable under Article 10, in the determination of liability, account shall be taken of such rules issued on grounds of security or public order as were in force at the place and time of occurrence of the event which resulted in damage or injury.

Article 13[759]

Non-contractual obligations arising from an event which does not result in damage or injury shall be governed by the law of the country in which that event occurred. However, if, by reason of a connecting factor common to the interested parties, there is a closer connexion with the law of another country, that law shall apply.

Article 14

The provisions of Articles 10 to 13 shall not apply to the liability of the State or of other legal persons governed by public law, or to the liability of their organs or agents, for acts of public authority performed by the organs or agents in the exercise of their official functions.

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759 This article was directed primarily at quasi-contracts.

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